88-6801

NO. _____

.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

.....

DAVID LEE POWELL,

PETITIONER

V.

THE STATE OF TEXAS,

RESPONDENT

.....

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, David Lee Powell, files this Motion in connection with his forma pauperis declaration, along with his petition for a writ of certiorari to the Court of Criminal Appeals of Texas.

This Court previously granted a his petition for a writ of certiorari, vacated the judgment and remanded this case to the Court of Criminal Appeals of Texas "for further consideration in light of Satterwhite v. Texas, 486 U.S. ---, 108 S.Ct. 1792 (1988)." Powell v. Texas, [No. 87-6135], 486 U.S. ---, 108 S.Ct. 2891 (1988).

On January 11, 1989, the Court of Criminal Appeals of Texas reaffirmed its original opinion, Clinton and Teague J.J. dissenting. Powell v. State, --- S.W.2d ___, [No. 67,630].

The Court merely deleted its previous "harmless error" references, now denominated "obiter dictum," and disregarded the substantive issues based on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)..

The ruling of the Court of Criminal Appeals of Texas ignores the plain import of this Court's remand order, and the holding in Estelle v. Smith, supra, as well as the serious Fifth and Sixth Amendment violations urged by the Petitioner, both before this Court in his original petition

for a writ of certiorari, on direct appeal to the Court of Criminal Appeals, and in the State trial court.

The issues raised by the petitioner are not frivolous but involve substantial constitutional questions.

For these reasons the indigent petitioner, David Lee Powell, prays that he be permitted to proceed without payment of costs in this Court.

Respectfully submitted

Will Gray

Will Gray
Petitioner's lawyer
16420 Park Ten Place
Houston, Texas 77084
713/492-7718

CERTIFICATION

I certify that I mailed a copy of his Motion with attached Affidavit to the Honorable Jim Mattox, Attorney General of Texas: Attention Enforcement Division, P.O Box 12548, Capitol Station, Austin, Texas 78711, on March 10, 1989.

Will Gray

Will Gray

NO. _____

****

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

****

DAVID LEE POWELL,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

****

IN FORMA PAUPERIS DECLARATION

I, David Lee Powell, declare that I am the petitioner in the above entitled case; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes_____ No✓.

a. If the answer is "yes" state the amount of your salary or wages per month, and give the name and address of your employer.

_____

b. If the answer is "no" state the date of last employment and the amount of the salary and wages per month which you received.

I HAVE BEEN CONFINED FOR TEN YEARS

2. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?

Yes_____ No✓.

b. Rent payments, interest or dividends?

Yes_____ No✓.

c. Pensions, annuities or life insurance payments?

Yes_____ No✓.

d. Gifts or inheritances?

Yes_____ No✓.

e. Any other source? Yes_____ No✓.

If the answer to any of the above is "yes" describe each source of money and state the amount received from each during the past twelve months.

_____

3. Do you own cash, or do you have money in a checking or savings account?

Yes✓ No_____ (include any funds in prison accounts).

If the answer is "yes" state the total value of the items owned.

INMATE TRUST FUND - $0.11

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes_____ No✓.

If the answer is "yes" describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support, state your relationship to those persons and indicate how much you contribute to their support.

NONE

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on the 24th day of February, 1987.

X David L. Powell
Petitioner

CERTIFICATE

I hereby certify that, on the 24th day of February, 1989, David Lee Powell has the sum of $ .11 on account to this credit at the Ellis Unit of the Texas Department of Corrections where he is confined. I further certify that he likewise has the following securities to his credit according to the records of said Texas Department of Corrections:

_____

_____

Bucky M. Taylor
Authorized Officer
Texas Department of Corrections
Huntsville, Texas

88-6801

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DAVID LEE POWELL,
Petitioner

versus

THE STATE OF TEXAS,
Respondent

APPLICATION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS
AFTER REMAND OF CAUSE NO. 87-6135

Will Gray
Petitioner's lawyer
16420 Park Ten Place
Houston, Texas 77084
713/492-7718

QUESTIONS PRESENTED

Question One

Whether this Court's remand order "subject[ed] only [the] secondary reliance [of the Court of Criminal Appeals] on the harmless error analysis of Satterwhite [v. Texas, --- U.S. ---, 108 S.Ct. 1792, 101 L.Ed.2d --- (1988)] to renewed review" and did not address, and left undisturbed, the State court's "initial determination of no [Estelle v.] Smith error, as well as the remaining holdings of [the] original opinion."

Question Two

Whether the Petitioner waived his Fifth and Sixth Amendment rights against self-incrimination and to the assistance of counsel, in violation of this Court's rulings in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), by presenting, at the guilt stage of the trial, expert psychiatric testimony to support his affirmative defense of insanity; did this "waiver" permit the State to adduce psychiatric testimony at the penalty stage of the trial on the issue of future dangerousness where such testimony was based on pre-trial competency and sanity examinations conducted without the warnings and notice required by Estelle v. Smith, supra, and where Petitioner presented no psychiatric testimony on that issue.

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OPINION BELOW

The original opinion of the Texas Court of Criminal Appeals is reported at 742 S.W.2d 343 (Tex.Cr.App. 1987).

The Court's opinion after remand is not yet reported; a copy of the slip opinion is attached as Appendix "A".

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is based on the following:

1. Petitioner's conviction and sentence of death were affirmed by the Court of Criminal Appeals of Texas on July 8, 1987. Petitioner's motion for leave to file a motion for rehearing, and motion for rehearing, submitted on August 7, 1987, were denied by the Court without written opinion, on October 28, 1987.
2. On November 3, 1987, the Court of Criminal Appeals of Texas granted petitioner's motion to stay or recall the mandate until the 28th day of December, 1987.
3. Petitioner's petition for writ of certiorari was filed on December 28, 1987, and was docketed as No. 87-6135. A copy of this petition is attached hereto as Appendix "B".
4. The petition was granted by this Court on June 30, 1988, and the cause was remanded to the Court of Criminal Appeals of Texas "for further consideration in light of **Satterwhite v. Texas**, 486 U.S. --- (1988), Cause No. 87-6135." Appendix "C".
5. On January 11, 1989, the Court of Criminal Appeals of Texas again affirmed the Petitioner's conviction for the offense of capital murder and sentence of death. Appendix "A," infra.
6. The Court of Criminal Appeals, on January 18, 1989, granted the Petitioner's motion to stay the mandate of affirmance until March 13, 1989, pending his timely filing of a petition for writ of certiorari. Appendix "D".

7. Rule 17.1 (c), Rules of the Supreme Court: The State Court "has decided an important question of federal law which has not been, but should be, settled by this Court, [and] has decided a federal question in a way in conflict with applicable decisions of this Court."
8. 28 U.S.C. Section 1257(3): "[W]here the validity . . . of a State statutes is drawn in question on the grounds of its being repugnant to the Constitution of the United States . . . [and] where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . [of] the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment to the Constitution of the United States: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .
2. Sixth Amendment to the Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."
3. Eighth Amendment to the Constitution of the United States: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
4. Fourteenth Amendment to the Constitution of the United States: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Article 37.071, Texas Code of Criminal Procedure:

"(b) On conclusion of the presentation of the evidence, [at the penalty stage of the trial] the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3). if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted."

6. Section 19.03, Texas Penal Code:

"(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer ... who is acting in the lawful discharge of an official duty and who the person knows is a peace officer ..."

7. Section 8.01, Texas Penal Code. Insanity.

"(a) It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of mental disease or defect, either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirements of the law he allegedly violated.

"(b) The term 'mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

STATEMENT OF THE CASE

A detailed statement of the case is contained in Appendix "B," the petition filed in Cause No. 87-6135.

Since the Court of Criminal Appeals, in its ruling after remand, has abandoned its original "harmless error" conclusion as dictum, and relies solely on Powell's purported waiver of his Fifth and Sixth Amendment rights, the following portions from Appendix "B" are germane to the issues presented in Powell's present petition:

After the State rested [at the guilt stage of the bifurcated trial], Petitioner raised the affirmative defense of insanity at the time of the offense. His evidence on this issue came chiefly from Dr. Emanuel Tenay, a psychiatrist.

Dr. Tenay testified that he had conducted lengthy interviews with Petitioner, members of his family, and his friends and acquaintances, and had reviewed a sizeable amount of Petitioner's personal writings.

In Tenay's opinion, Petitioner had been insane on May 18, 1978, at the time officer Ablanedo was shot and killed. He believed that on that occasion Petitioner was suffering from paranoid schizophrenia, a form of psychosis.

Dr. Tenay believed that this condition was largely the result of prolonged use of psychoactive drugs such as amphetamine and methamphetamine. [R. X, 2587-2672].

The State refuted this defensive theory through the testimony of Dr. Richard Coons, a psychiatrist, and Dr. George Parker, a psychologist, both of whom had examined the Petitioner pursuant to court order shortly after the offense was committed.

Dr. Coons met with and examined Petitioner on four occasions: on May 18, 1978, some 12 hours after the shooting, and again on May 23, May 29 and June 4, 1978.

These interviews occurred pursuant to an order signed by the trial court on the morning of the shooting which required Petitioner to undergo examination and testing by Dr. Coons and a practicing psychologist of Coons' choice to determine Petitioner's present competency and his sanity at the time of the offense. The order was entered on the State's motion.

Dr. Coons testified that based on his several examinations there was no indication that Petitioner had been insane on May 18, 1978. He specifically disclaimed having observed any evidence that Petitioner was suffering from paranoid schizophrenia. [R. X,2725-2738].

Dr. George Parker, a clinical psychologist testified that he had met with Petitioner on June 25 and July 2, 1978, at the Travis County jail. Each meeting lasted about two hours. He administered several standardized psychological tests to Petitioner, to determine intelligence, to detect the presence of any organic neurological disorders, and to examine personality functions. He was able to detect no organic difficulties. He found Petitioner to be very intelligent and articulate, with an IQ of 128. He characterized Petitioner's personality as impulsive, high-energy, rebellious, non-conforming, immature and somewhat egocentric. In his opinion Petitioner had been sane under Texas law on May 18, 1978. His testing showed no indication of paranoid schizophrenia. [R. X, 2709-2719].

This testimony, obviously accepted by the jury, clearly refuted any claim that the Petitioner's mental condition was sufficient to diminish his responsibility for the murder. According to the State's expert, Petitioner was sane and fully responsible for his acts.

Nothing in defense expert Tenay's testimony raised an issue of diminished responsibility. The fact that his opinion was predicated on the conclusion that the Petitioner's mental defect was induced by the use of drugs, in itself, militated against such a finding and had scant, if any, value as

a mitigating factor.

At the penalty stage of the trial the State put on evidence that in January 1978, the petitioner committed the unadjudicated felony offenses of burglary and aggravated assault committed after his landlord impounded his personal effects for non-payment of rent.

Also admitted as punishment evidence was testimony that a search of Petitioner's house the day after the shooting revealed a hand grenade, two cannisters of ether, a box of .45 caliber ammunition, a box of 7.62 mm Russian ammunition, and a set of die used in processing ammunition for an AK-47 Russian automatic rifle, various beakers, chemicals and paraphernalia, including three small vials containing methamphetamine, with a total weight of approximately one gram. [R. XI, 2935-2954].

Drs. Coons and Parker were called by the State and permitted, over objection, to testify on the issue of future dangerousness based on their examinations, interviews and testings of Petitioner. Both testified that in their opinion there was a "high" probability Petitioner would commit future acts of violence and would be a continuing threat to society. [R. XI, 2978-2979; 3000]

Defense expert Tenay did not testify at the penalty stage of the trial. Petitioner called the Travis County district attorney, who testified that Petitioner through his counsel had volunteered the information that there was a hand grenade in his house. Edith Roberts, one of Petitioner's counsel, also testified to the voluntary surrender of the grenade.

Question One

Whether this Court's remand order "subject[ed] only [the] secondary reliance [of the Court of Criminal Appeals] on the harmless error analysis of Satterwhite [v. Texas, --- U.S. ---, 108 S.Ct. 1792, 101 L.Ed.2d --- (1988)] to

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Question Two

Whether the Petitioner waived his Fifth and Sixth Amendment rights against self-incrimination and to the assistance of counsel, in violation of this Court's rulings in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), by presenting, at the guilt stage of the trial, expert psychiatric testimony to support his affirmative defense of insanity; did this "waiver" permit the State to adduce psychiatric testimony at the penalty stage of the trial on the issue of future dangerousness where such testimony was based on pre-trial competency and sanity examinations conducted without the warnings and notice required by Estelle v. Smith, supra, and where Petitioner presented no psychiatric testimony on that issue.

REASONS FOR GRANTING THE WRIT

I.

REFUSAL OF THE COURT OF CRIMINAL APPEALS TO REVIEW THE ESTELLE V. SMITH ISSUE ON REMAND.

The Court of Criminal Appeals ruled, in Satterwhite v. State, 726 S.W.2d 81 (Tex.Cr.App. 1986, that the defendant's Sixth Amendment rights, articulated in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), were violated where defense counsel was not given advance notice that defendant's psychiatric examination by Dr. Grigson would include the issue of future dangerousness and where Grigson's testimony on that critical penalty question was

admitted for the State at the punishment stage of the trial. The Court further found that the admission of Grigson's testimony was harmless error.

This Court agreed with the Sixth Amendment conclusions of the Court of Criminal Appeals but, from its own review of the sentencing evidence, was unable to say that Grigson's testimony did not influence the sentencing jury, under the "harmless error" rule established in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). See, Satterwhite v. Texas, --- U.S. ---, 108 S.Ct. 1792, 101 L.Ed.2d --- (1988).

In Powell v. State, 742 S.W.2d 353 (Tex.Cr.App. 1987), the Court of Criminal Appeals found:

> ". . . [t]he record reflects that at no point in time did Coons or Parker inform [Powell] or his attorneys that they were asked to or had examined [him] on the issue of future dangerousness. Nor did Coons or Parker give [Powell], who was in custody, Miranda warnings." Id., at 357.

Despite these admitted Fifth and Sixth Amendment violations, the Court of Criminal Appeals ruled that there was no error because Powell raised the "defense of insanity, which is applicable to guilt-innocence as well as punishment issues, [thereby waiving] his Fifth and Sixth Amendment rights under Estelle v. Smith, supra concerning such psychiatric testimony."

After finding no error in the admission of the State's psychiatric testimony on future dangerousness, the Court of Criminal Appeals asserted that, "even if error could be discerned, such was harmless under our then recent decision of Satterwhite v. State, 726 S.W.2d 81 (Tex.Cr.App. 1986)..."

To circumvent the plain import of this Court's remand mandate, the Court of Criminal Appeals eliminated its "harmless error" statements and affirmed the Petitioner conviction and sentence of death on the following unfathomable reasoning:

"Soon thereafter, the Supreme Court reversed Satterwhite I to hold that the Chapman v. California, 386 U.S. 18, 24 (1967), harmless error test applies to Smith error. Satterwhite II, supra at 486 U.S. ____, 108 S.Ct. 1797-98.

...

"After handing down Satterwhite II, the Supreme Court summarily vacated and remanded the instant case with a cursory order that it be further considered in light of Satterwhite II. Powell v. Texas, [--- U.S. ---, 108 S.Ct. 2891 101 L.Ed.2d ___ (1988)].

"Thus, the Court's remand of the instant case under Satterwhite II subjects only our secondary reliance on the harmless error analysis of Satterwhite I to renewed review. [citations omitted].

"Because we initially held that there was no error, the harmless error analysis of our original opinion was superfluous to the disposition and constituted nothing more than obiter dictum. However, in this dictum we utilized a harmless error standard which the Supreme Court has now denounced. Satterwhite II, supra.

"Thus, we withdraw that portion of our original opinion which gratuitously applied a harmless error analysis and we further disavow our prior reliance on the now overruled Satterwhite I.

"Our initial determination of no Smith error ... [was] not addressed by the Court; thus, [it] remained undisturbed. Consequently, appellant's conviction stands affirmed." Appendix "A" at pages 3-4.

In his able dissenting opinion after remand, Judge Clinton noted that "there is more to reconsider than just 'secondary reliance on the harmless error analysis of Satterwhite I.' Slip Opinion, at 4." Appendix "A" - Clinton dissent at page 4.

He did not feel that this Court would remand a case for reconsideration of a "superfluous harmless error analysis,

albeit it was utterly flawed. Unless the Supreme Court believed 'there was error in admitting the testimony of Drs. Coons and Parker.' Powell v. State, supra, at 359, there is nothing to test for harm." Id., at pages 4-5.

The testimony of Coons and Parker violated Petitioner's Fifth and Sixth Amendment rights, as conceded by the Court of Criminal Appeals. But for the Court's conclusion that the Petitioner waived these rights by presenting testimony at the guilt stage of the trial to support his affirmative defense of insanity, "the trial court plainly committed error of constitutional dimension." Id., at page 6.

Finally, Judge Clinton wrote:

"Patently, the Supreme Court was not persuaded that either the 'waiver' theory applied by the majority of this Court or the alternative pursued by the State warranted summary affirmance of the judgment of this Court or a denial of certiorari [in Powell]. See Rule 23.1, supra.

"Accordingly, its remand for reconsideration of 'the entire case' was on account of the Sixth Amendment error confirmed and found to be harmful in Satterwhite v. Texas. Contrary to the view of the majority, slip opinion, at 4, 'the holdings of our original opinion do not "remain undisturbed."'"

"Because the majority refuses to reconsider the sixth amendment violation, and thereby invites another petition for writ of certiorari, I respectfully dissent." Id. at page 5-6.

The dissenting opinion by then Presiding Judge Onion, on the original submission of this cause, finding reversible error in the State's violation of Estelle v. Smith, through its use of the Coons/Parker testimony at the penalty phase of the trial, properly defines the applicable law. 742 S.W.2d at 361-370.

Presiding Judge Onion retired from the bench on January 1, 1989, and thus did not participate in the decision ren-

dered by the Court of Criminal Appeals after remand.

Judge Clinton's dissent to the post-remand opinion correctly delineates the refusal of the Court of Criminal Appeals to follow the directive of this Court.

The Court of Criminal Appeals has declined the opportunity to make a proper "harmless error" analysis of the admitted Fifth and Sixth Amendment violations. That evaluation should now, by default, be made by this Court.

In support of his argument that the error was not harmless, the Petitioner incorporates herein the argument and authorities previously submitted by him in Cause No. 87-6135.

II.

VIOLATION OF PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS

Petitioner relied on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), which at the time of the trial had been decided adversely to the State by the United States District Court' Smith v. Estelle, 445 F.Supp. 647 (ND Tex. 1977) and on Battie v. Estelle, 655 F.2d 692 (5th Cir.1981), decided while his case was pending on appeal.

This Court's intervening decision in Buchanan v. Kentucky, --- U.S. ----, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), does not alter the validity of the Petitioner's basic Fifth and Sixth Amendment claims, and does not support the "waiver" conclusions used by the Court of Criminal Appeals to foil the Smith mandate.

The Court of Criminal Appeals interpreted Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), as holding

> "that where prior to the in-custody psychiatric examination ordered by the court to determine the defendant's competency to stand trial the defendant had not been warned that he had the right to remain silent, and that any statement made could be used against him at the sentencing proceeding, admission at the penalty stage of a capital felony trial of a psychiatrist's

> damaging testimony on the crucial issue of future dangerousness violated the Fifth Amendment privilege against compelled self-incrimination because of a lack of appraisal of rights and a knowing waiver thereof, the death penalty imposed could not stand."
>
> "The Court further held that the Sixth Amendment's right to counsel was violated where defense counsel was not notified in advance that the psychiatric examination would encompass the issue of future dangerousness and there was no affirmative waiver of the right to counsel."

A.

The Court of Criminal Appeals relied on the following illusive differences between the facts in Smith, and those in Powell's case: [Undisputed facts in the record, as noted by the dissenting judges are indicated in this resume and noted therein].

1. In Smith, the State trial judge, on his own motion, appointed psychiatrist Grigson to examine Smith and determine his competency to stand trial.
2. Shortly after Powell's apprehension on May 18, 1978, the prosecutor filed a motion requesting the trial court to order a psychiatric examination, claiming he had information which raised questions of Powell's (1) mental competency to stand trial and his (2) sanity at the time of the offense.
   a. The same day the trial court ordered Dr. Richard Coons, a psychiatrist, and a psychologist of his choice to examine Powell for the purpose of determining present competency and sanity at the time of the offense.

      Dr. Coons examined Powell on May 18th, 23rd and 29th and June 4, 1978.
   b. On May 18, 1978, Attorney Edith Roberts was appointed to represent Powell.

c. Roberts had telephone conversations with Dr. Coons on May 23 and 24, 1978. She gave Coons permission to have Dr. Parker do some psychological testing of Powell. Nothing in the record shows that Parker's psychological testing would encompass the future dangerousness issue. In addition, Coons was already operating under a court order that permitted such testing by a psychologist of his choice.

3. Dr. Grigson examined Smith without giving any warnings regarding his Fifth Amendment privilege against self-incrimination and did not notify defense counsel that the psychiatric examination would encompass the issue of Smith's future dangerousness, nor was the defendant accorded the assistance of counsel in determining whether to submit to such examination.

4. After the examination, Dr. Grigson reported to the court that Smith was competent to stand trial.

5. At his trial Smith raised no issue of either his competency to stand trial or his insanity at the time of the offense.

6. Grigson testified as a State's witness at the penalty stage of Smith's trial that, based upon his examination, he considered Smith a severe sociopath who would commit violent acts in the future "if given the opportunity to do so."

7. Powell was taken before a magistrate on the day of his arrest and warned of the accusation against him. Nothing in the record shows that the magistrate's warning included one relating to the psychiatric examinations.

8. Neither Coons nor Parker informed Powell or his attorneys that they had examined Powell on the issue of future dangerousness. Coons' initial examinations had taken place before his telephone conversations with defense counsel Roberts. Neither Coons nor Parker gave Powell, who was in custody, Miranda warnings.

9. Powell and his attorneys did not request a psychiatric examination on Powell's future dangerousness and they did not indicate they intended to offer psychiatric evidence at the penalty stage of the trial. [dissenting opinion].

10. On June 22, 1978 Powell filed notice that he was presently incompetent to stand trial and that he would offer at trial "evidence of the insanity defense." [dissenting opinion].

11. Dr. Coons made two reports dated July 15, 1978, addressed to the district attorney, finding Powell to be competent and sane. [dissenting opinion].

12. The issue of present incompetency was abandoned by Powell on July 10, 1978. [dissenting opinion].

13. Powell did present the defense of insanity by the testimony of a Dr. Tenay, a psychiatrist. [dissenting opinion].

14. The State countered with the testimony of Drs. Coons and Parker that Powell was sane when the offense was committed. [dissenting opinion]. Defense counsel made no objection to this proper rebuttal use of the Coons/Parker testimony on the insanity issue. Additionally, these experts had been ordered by the Court to inquire into that specific issue.

15. At the penalty stage of the trial the State offered the testimony of Drs. Coons and Parker, over objection, as to the issue of future dangerousness. Based on their examinations, interviews and testing, they expressed the opinion there was a probability that Powell in the future would commit criminal acts of violence that would constitute a continuing threat to society. [dissenting opinion].

16. The record does not reflect that either Dr. Coons or Dr. Parker gave Powell, who was in custody, Miranda warnings or informed him that the examinations were also for the purpose of determining his future dangerousness

and whether he presented a continuing threat to society. And his attorneys were not informed that the examinations and testings were for this additional purpose. [dissenting opinion].

17. Except for Dr. Coons' interview on May 18, 1978, Powell, as in Smith, supra, was already under indictment when the examinations and testing took place. Thus his right to assistance of counsel had attached. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). [dissenting opinion].

18. The opinion testimony of Drs. Coons and Parker offered by the State at the penalty stage of the trial was not made admissible because of any consent on the part of Powell to any examination for future dangerousness or because of the use by the Powell of psychiatric or psychological testimony at the penalty stage of the trial. [dissenting opinion].

19. The testimony of Drs. Coons and Parker cannot be classified as hypothetical opinion testimony of a psychiatrist or psychologist, who has not examined the defendant. Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), reh. den. 464 U.S. 874, 104 S.Ct. 209, 78 L.Ed.2d 185. [dissenting opinion].

B.

The Court's majority found the following superficial but critical differences between Petitioner's case and Smith.

1. "The distinguishing factor is that in Powell's case he argued the affirmative defense of insanity during the guilt-innocence phase of the trial through the testimony of [defense witness] Dr. Tenay."

2. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), "seems to suggest" that a defendant who introduces testimony on the issue of insanity at the guilt stage waives his Smith rights to prevent the State's use of similar psychiatric testimony at the penalty stage of the trial.

3. All members of the Court of Criminal Appeals agreed with the following Battie propositions:

   a. "A defendant's mere submission to a psychiatric or psychological examination does not constitute a waiver of his Fifth Amendment privilege."

   b. "The waiver doctrine does not apply if the defendant does not introduce the testimony of mental health expert on the issue of a mental state relevant to the offense or a defense raised by the evidence in the case."

   c. "There is a distinction between "the use of psychiatric examinations by the defense or the State to determine a defendant's competency to stand trial with the use of a psychiatric examination by the defense or the State to ascertain the defendant's insanity at the time of the crime."

   d. "Each use of psychiatric testimony raises questions different from those raised by the other and different doctrines have developed to account for these different problems."

   e. "The State's use of the results of a competency examination does not infringe upon a defendant's fifth amendment privilege because it does not assist the State in proving any of the elements necessary to support the imposition of a criminal punishment under state law."

   f. "When the same type of examination is used to determine a defendant's culpability or responsibility for the crimes charged against him the Fifth Amendment privilege is involved because the use of a psychiatric or psychological examination in this context may assist the State in establishing the basis for imposition of a criminal punishment. 655 F.2d at 700-701. (footnotes omitted)."

C.

The Court majority, narrowly and incorrectly construing both Smith and Battie, concluded that "once the defendant has argued the affirmative defense of insanity by use of testimony from a mental health expert, the Fifth Amendment privilege accompanying any psychiatric testimony has been waived."

The majority interpolated this limitation on the Smith rationale by finding that the Battie Court, in rejecting "the State's contention regarding waiver by virtue of requesting a competency hearing ... implicitly endorsed the concept of waiver by arguing the affirmative defense of insanity."

This implicit endorsement was supported by the fact that in a Texas capital murder trial, "since the information testified to by the mental health experts goes to assist the State in proving up one of the elements necessary to support the imposition of capital punishment under state law -- specifically, the issue of future dangerousness -- under Battie, [Powell], in presenting such an insanity defense has waived his Fifth Amendment privilege."

This last statement implies that the applicable Texas statutes eliminate all Fifth Amendment considerations at the penalty phase of the trial where the parties have presented evidence at the guilt phase of the trial on an entirely different issue on which defendant has the burden of proof.

Under the court's murky reasoning "a defendant can invoke the protection of the privilege [only] when he does not introduce mental health expert testimony."

The Court's majority found further affirmation for Powell's "waiver" of his Fifth Amendment privilege "by several of his actions at the punishment phase of the trial." These actions were:

1. Powell requested a jury instructions on the issue of "diminished responsibility" in mitigation of punishment, based on the psychiatric testimony adduced by him at the guilt stage of the trial in support of his affirmative defense of insanity at the time of the offense.

This ignores the fact that these requested mitigating instructions were rejected by the trial judge and that rejection was affirmed by the Court on appeal, and the further fact that the Texas capital murder scheme has no provision for a jury instruction on mitigating evidence. See Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987).

A second factor supporting the "waiver" of Powell's Fifth and Sixth Amendment rights occurred, according to the Court majority, during closing argument at the punishment phase of the trial, when Powell's attorney made the following argument:

> "'But when we talk about psychiatric testimony, I just really wonder if you missed the whole thing. Dr. Coons [the State expert], four years experience; Dr. Tenay [the defense expert], twenty years experience; Dr. Coons, no medical history on the patient; Dr. Tenay, complete medical history; : Dr. Coons, no forensic medicine in homicide (sic); maybe had heard a lecture and been around a little but no courses as such; Dr. Tenay, the leading authority in the United States on forensic medicine on homocide (sic).'"

The majority concluded from this argument that:

> "[c]learly, the defense wished the jury to consider the psychiatric testimony introduced by [Powell] at the guilt-innocence phase of the trial and compare it with the psychiatric and psychological testimony elicited from the State's experts at both the guilt-innocence phase of the trial and the punishment phase of the trial.

This argument touched in no way any aspect of Tenay's guilt stage testimony relating to insanity that had a bearing on the future dangerousness issue. It was made after the jury had rejected Tenay's testimony on the insanity issue at

the guilt stage of the trial and after the trial court had admitted and the jury had heard the inadmissible testimony of Coons and Parker on the issue of future dangerousness and the trial court had refused to instruct the jury on the issue of diminished responsibility.

The Powell majority found the following illusory similarities with Penry v. State, 691 S.W.2d 636 (Tex.Cr.App. 1985):

> 1. Penry raised the issue of insanity at the guilt phase and reintroduced all of that testimony at the punishment stage, making it clear from his jury argument that he wanted the jury to reconsider all of the testimony relevant to the insanity defense at the punishment stage, and wanted the jury to consider it as to "each of those special issues." It was clear [to the Court] that Penry's jury arguments and reintroduction of the guilt phase testimony were not a response to the testimony of the State's experts. Rather, throughout the entire trial, Penry relied heavily on his history of mental instability.

There is nothing in the Powell record to show that it was he who introduced the guilt-stage evidence at the penalty stage of the trial.

Even had he done so, however, this reintroduction could not, under the Texas capital murder scheme, have aided the jury in considering his claim of diminished responsibility and impaired mental condition in mitigation of punishment. In addition, defense counsel did not even argue these mitigating defenses after the trial court rejected his requested jury instructions. Their desultory argument in comparing Tenay's qualifications with those of Coons and Parker, were not directed to the rejected mitigating factors.

> 2. "Since [Penry] raised the issue of insanity at the guilt-innocence stage of the trial and at the punishment hearing with respect to all of the special issues, including future dangerousness, he effectively waived

> his Fifth and Sixth Amendment rights to complain about the future dangerousness testimony of Peebles and Vogtsberger, which testimony was based in part on psychiatric examinations of [Penry] during which insufficient warnings were given." 691 S.W.2d at 652. The Court found succor for these conclusions in the rule that:
>
> "In answering the special issues under Article 37.071, V.A.C.C.P., including the issue of future dangerousness, the jury may consider all of the properly admitted evidence at the first or guilt stage of the bifurcated trial, including the testimony of [Powell's] own psychiatrist on the issue of insanity as a defense." [citations omitted].

This statement ignores the fact that, while Powell had the burden of proof on the defensive issue of insanity, it was the State's burden at the penalty stage of the trial, to prove the probability of his future dangerousness beyond a reasonable doubt.

D.

Presiding Judge Onion, joined by Judge Clinton, dissented from the court's disposition of Powell's Smith claim. The important factors in their dissent were:

1. Powell's future dangerousness was a critical issue at the penalty stage of the trial, and one upon which the State had the burden of proof beyond a reasonable doubt. Article 37.071(b) and (c), V.A.C.C.P.
2. The State, to meet its burden, used Powell's own statements unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty.
3. The use of a doctor's testimony on future dangerousness at the penalty stage of the trial, when the opinion is based on questioning of a defendant in custody who is represented by counsel and the questioning is conducted without prior warning on

the Fifth Amendment privilege and without opportunity for advice of counsel violates both the Fifth and Sixth Amendments to the Constitution of the United States.

4. Even though they had no right to attend the psychiatric examination, Powell's counsel should have been informed that the examinations and testings would encompass the issue of future dangerousness.

5. Additionally, the attachment of the right to counsel meant that Powell could have consulted with his attorney prior to the examinations and testings.

6. There is nothing to indicate that Powell gave a knowing, intelligent, and voluntary waiver of his right to counsel, and a waiver will not be presumed from a silent record.

7. There were violations of both Powell's Fifth and Sixth Amendment rights at the penalty stage of the trial.

8. Powell did not waive his Smith claims (1) by his "mere submission to the psychiatric and psychological examinations for the purposes of determining competency and insanity at the time of the commission of the alleged offense." This claim was predetermined in Battie v. Estelle, 655 F.2d 692, 702 (5th Cir.1981); see Booker v. Wainwright, 703 F.2d 1251, 1256 (11th Cir.1983); and Cape v. Francis, 741 F.2d 1287, 1295 (footnote # 9) (11th Cir.1984).

9. Under Texas law and the Court's own interpretation of the Texas bifurcated trial system, "a defendant who waives his privilege against self-incrimination by testifying at the guilt stage of the trial may not be recalled at the penalty stage of the trial to assist the State in proving an issue upon which it has the burden of proof." Brumfield v. State, 445 S.W.2d 732 (Tex.Cr.App.1969). Thus, under Texas law, "any waiver [by Powell] at the guilt stage did not survive until the penalty stage."

10. Powell's "waiver of the privilege against self-incrimination at the guilt stage by offering psychiatric testimony on the defensive issue of insanity upon which he had the burden of proof did not survive and carry over to the penalty stage of a capital murder trial under Article 37.071, V.A.C.C.P., so that on the basis of such waiver the prosecution could call psychiatric and psychological witnesses on the issue of future dangerousness on which it had the burden of proof beyond a reasonable doubt where Powell did not testify nor offer psychiatric testimony or otherwise waive his privilege against self-incrimination at that stage of the trial."

E.

The conclusions reached by Presiding Judge Onion are amply supported by the authorities he cited. His reasoning is further supported by the following analogous cases which have applied Smith in varying fact situations.

Isley v. Wainwright, 792 F.2d 1516 (11th Cir. 1986), is closely in point, although the issue did not involve unwarned expert testimony offered at a second phase of the trial.

There, defense counsel made a timely motion to limit the direct testimony of the State's rebuttal psychiatric experts to the issue of sanity. The motion was denied. The two psychiatric experts, whose compulsory examination of Isley had been made pursuant to a court order, then related details of the crime as told to them by Isley. These statements refuted Isley's trial contentions that he had been under the influence of both alcohol and drugs and they destroyed defense counsel's attempts to establish a lack of premeditation due to excessive use of drugs and a mental disorder.

They showed Isley's complicity in the crime with his accomplices and suggested Isley's knowledge that his conduct was wrong.

Florida law limited a court-appointed psychiatrist's testimony for the State to his opinion on the issue of sanity or insanity. He could not testify directly to any of the facts related to him by the defendant during the examination. See Parkin v. State, 238 So.2d 817 (Fla.1970).

Appellate counsel drew the Court's ire with his incorrect statement that both Parkin and Vardas v. Estelle, 715 F.2d 206 (5th Cir.1983), held that once an accused gives his notice of intention to rely on the insanity defense and has introduced psychiatric evidence on the guilt/innocence phase of his trial supporting this claim, he has waived his Fifth Amendment privileges in the same manner as would the defendant's election to testify at trial.

The Court said, "As relates to Vardas v. Estelle, supra, ... where, as here, the testimony of the state psychiatrist is offered solely in rebuttal to a defense of insanity' and is properly limited to that issue, ' the defendant's Fifth Amendment rights are not violated."

In United States v. Chitty, 740 S.W.2d 425 (2nd Cir. 1985), the record showed that Chitty in a court-ordered, unwarned examination into his competency to stand trial, made specific threats against the prosecutor. At the competency hearing, the trial judge ruled that the statements were not pertinent to the question of competency but admitted them anyway because they were relevant to the determination of Chitty's bail status. Relying largely on these threats, the court ordered Chitty held without bail.

After Chitty's conviction, the probation officer indicated in a presentence report that Chitty had "made threats against the life of the prosecutor." At the sentencing proceeding, a second prosecutor who had not previously appeared in the case made the threats a major part of his plea that Chitty be incarcerated for a long time. Chitty's motion to

strike the references to the threats and asked the district judge to recuse himself. Both motions were denied.

Chitty challenged his sentence as violative of his Fifth and Sixth Amendment rights because it was based in part on statements he made at the court-ordered psychiatric examination. The Court reversed the sentence and remanded the cause for resentencing by another Judge, stating at page 431: "The nature of the competency hearing in this case and in Estelle v. Smith are fundamentally the same."

A second theory has been advanced by some Courts as a limitation on the Smith doctrine, in cases where the compelled and unwarned psychiatric testimony is admitted at the penalty or sentencing phase of the trial.

These courts have limited the application of Smith "to those sentencing proceedings in which the government bears a burden of proof relating to a critical aggravating factor such as dangerousness."

Where "there was no particular burden of proof to be met, and the court was imposing a sentence in its discretion ... [t]he Fifth Amendment factors involved in Smith are no longer implicated. See, United States ex rel. Bachman v. Hardy, 637 F.Supp. 1273 (DC Ill, N.D. 1986).

Bachman, after conviction and before sentencing, was subjected to an unwarned, court-ordered psychological examination. During the course of the examination, he made incriminating statements about his prior history of drug use. These statements were included in the psychologist's report submitted to the trial court. Bachman argued that the sentence he received was imposed in violation of his Fifth Amendment privilege against self-incrimination. He relied on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

After a careful analysis, the Court found that both Smith and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), excluded the State's use of statements made during a custodial interrogation "unless it demon-

strates the use of procedural safeguards effective to secure the privilege against self-incrimination," and allow for the suspect's intelligent decision to either assert or waive the privilege.

Smith did not apply to Bachman's penalty proceedings because the government had no specific burden of proof and the sentence to be imposed was discretionary with the trial court, unlike Smith, where the state bore the burden of proving the future dangerousness issue beyond a reasonable doubt. This distinction appears to be a sophisticated variation of the harmless error rule.

The Court cited a variety of cases in support of this critical distinction in the purpose served by the Fifth Amendment during the penalty stage of a trial. See Witt v. Wainwright, 714 F.2d 1069 (11th Cir.1983), reversed on other grounds, Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Baumann v. United States, 692 F.2d 565 (9th Cir.1982); Battie v. Estelle, 655 F.2d 692, 698 (5th Cir.1981); cf. Cape v. Francis, 741 F.2d 1287 (11th Cir.1984), cert. denied, --- U.S. ----, 106 S.Ct. 281, 88 L.Ed.2d 245 (1985); United States v. Jones, 640 F.2d 284, 288 (10th Cir.1981) Finney v. Rothgerber, 751 F.2d 858 (6th Cir.) cert. denied, --- U.S. --, 105 S.Ct. 2048, 85 L.Ed.2d 310 (1985); see also United States ex rel. Cyburt v. Lane, 612 F.Supp. 455, 463 (N.D.Ill.1984).

The cases in which Smith has been circumvented on a finding of "waiver" are fairly straightforward and are clearly distinguishable from Powell's case.

The Court in Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983), recognized the specific problem inherent in Powell's case, but disposed of the issue on other grounds.

Booker raised the defense of insanity through the testimony of a psychiatrist, thus, under Battie, waiving his Fifth Amendment privilege and permitting the State to use similar expert testimony, at least at the guilt stage of the trial.

The Court did not have to address the issue of whether the Battie "waiver" concept applied in a case where the use of the psychiatric testimony occurred during the penalty phase of the trial after the jury had already rejected Booker's defense of insanity by finding him guilty. Booker testified at the penalty stage of the trial that he had no recollection of the day of the crime. This permitted the prosecutor to cross-examine him with information Booker had given to a psychiatrist without the constitutional safeguards of Smith.

In Williams v. Lynaugh, 809 F.2d 1063 (5th Cir. 1987), the Court rejected a Smith claim based on the "waiver" doctrine from Vardas . Estelle, 715 F.2d 206 (5th Cir. 1983).

According to the Court, "Vardas stands for the proposition that when a defendant introduces psychiatric evidence on a critical issue, he waives his fifth and sixth amendment objections to the state's psychiatric testimony, provided that the state's evidence is used solely in rebuttal and properly limited to the issue raised by the defense." [emphasis added]

This conclusion, of course, supports Petitioner's position.

Williams raised the issue of future dangerousness through the testimony of his psychiatrist, and in his cross-examination of the state's psychologist.

"Having first been raised by the defense, it was perfectly proper for the state to explore this issue on the redirect examination of its psychologist." See Riles v. Lynaugh, 799 F.2d 947 (5th Cir. 1986).

Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988), offered a slight variation of the Williams/Riles rulings.

There, at the sentencing phase of the trial, two drug treatment and rehabilitation counselors testified for the defense that Schneider was capable of rehabilitation.

As a rebuttal witness, the State called a court-appointed psychiatrist who had earlier examined the defendant to de-

termine his competency. This examination was done at the defendant's request. It was the psychiatrist's opinion, based on his examination, that the defendant was a sociopath without prospect of rehabilitation.

The Respondent relied on Buchanan v. Kentucky, --- U.S. ---, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987), where this Court held that a defendant who presents psychological testimony concerning his mental state, may not then invoke the privilege against self-incrimination to bar the prosecution from rebutting his evidence with statements he made during an examination by a court-appointed psychiatrist. [emphasis added].

Schneider's various efforts to distinguish Buchanan went for naught.

First, contrary to Schneider's claim, the Buchanan ruling was not limited to cases where the defendant has introduced expert mental health testimony from a psychiatrist or psychologist.

"[T]he experience of Schneider's witnesses rendered their testimony analogous to the expert psychological evidence that the defendant introduced in Buchanan."

This use of experienced lay witnesses who were the functional equivalent of expert psychiatric witnesses was carefully limited to the facts of Schneider's case, and the Court noted:

> "If, for example, Schneider had called his family or friends to testify that he was a good fellow and could be reformed, he would not have opened the door to the use of the psychiatrist's expert testimony against him. In general, the defendant must introduce mental-status evidence that may fairly be characterized as expert testimony before the prosecution may respond with the results of a psychiatric examination."

Petitioner Powell introduced no testimony from a single witness who was the functional equivalent of an expert psychiatric witnesses. Compare Satterwhite, supra, where it was

of no moment that a psychologist who lacked the standing and polish of State expert Grigson, gave her opinion on future dangerousness which coincided with that of Grigson.

In Schneider, it was he who requested the competency examination. The Buchanan Court "regarded such a request as militating against the defendant's assertion of the [Fifth Amendment] privilege, for ... 'if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested.'"

Schneider's Sixth Amendment claim was also rejected because he had requested the examination.

> "The Sixth Amendment guarantees consultation with counsel, which Schneider undoubtedly had, since he requested the examination through counsel.
>
> "Schneider also received advance notice of who would conduct the examination, and he received the results before trial."

Schneider's final claim was that, even though he requested the examination, he was not informed that it would be used for more than the competency issue. The Court ruled:

> "Schneider cannot complain of the mere fact that the examination extended beyond the subject of competency. He can only object to the use of that broadened examination against him; and he is held, as a matter of policy if not of "knowing and intelligent" waiver, to have invited that use by introducing mental-status testimony of his own. If maintenance of a 'fair state-individual balance' requires this conclusion under the Fifth Amendment, Schneider may not circumvent this policy through the Sixth Amendment." See Re v. State, 540 A.2d 423 (Del.Sup. 1988).

Compare State v. Comeaux, 514 So.2d 84 (La.Sup. 1987). There, State psychiatrist Strickland examined the defendant, charged with capital murder, without the knowledge, consent,

or presence of his appointed counsel, who was not aware that the examination had been conducted until some time afterward.

At the penalty stage of the trial, defense counsel claimed that the defendant should be spared the death penalty because of the his mental retardation and other mental defects.

In its penalty case in chief, the State called two witnesses who were present at the initial examination of the victims' bodies. They testified as to the condition of the bodies and the crime scene.

Among the witnesses called by the defense was psychologist Rhea, who testified that, in addition to mental retardation, defendant suffered from episodic explosive disorder; that he could not distinguish between right and wrong during his explosive episodes.

The State then called Strickland as a rebuttal witness, over defense counsel's objection that the State had sent Strickland to see defendant without counsel's knowledge or consent.

Strickland testified that, based on his interview with the defendant, and on his review of other medical records, Dr. Rhea's diagnosis was inconsistent with prior diagnoses of a conduct disorder, and inconsistent with the defendant's apparent intact memory. In Dr. Strickland's view, defendant suffered only from mild mental retardation.

While taking note of the Buchanan ruling, the Louisiana Court held:

> "... defense counsel was not notified that the state was going to have defendant examined, although defendant's sixth amendment rights clearly had attached at the time of Dr. Strickland's examination ... Because Dr. Strickland later testified at the penalty hearing in rebuttal of defense evidence tending to show mental disease or defect, a statutory mitigating circumstance, Dr. Strickland's examination of defendant, like Dr.

> Grigson's examination of the defendant in Estelle v. Smith, 'proved to be a "'critical stage"' of the aggregate proceedings against respondent.'" Estelle v. Smith, supra, at 470, 101 S.Ct. at 1877. This was especially true since Dr. Strickland was called for the first time in rebuttal. Thus, by the state's failure to give defense counsel notice of its intent to examine defendant, defendant was effectively deprived of his sixth amendment right to the assistance of counsel in dealing with the examination of Dr. Strickland. Accordingly, because of the use of Dr. Strickland's testimony during the penalty phase of defendant's trial, which testimony was based upon an examination conducted in violation of defendant's sixth amendment rights, we conclude that defendant's sentences must be vacated, and a new penalty hearing conducted."

The Comeaux Court gave no consideration to the Fifth Amendment prong of Smith because the issue was not raised by the defendant.

While not articulated in its opinion, the Court may have struck a 'fair state-individual balance' in accord with Schneider and Buchanan, finding that the State's actions were wanting in fundamental fairness, and according the defendant's Sixth Amendment right to counsel priority over the State's right to rebut the defensive evidence on an issue upon which the State had the burden of proof.

Similar policy considerations militate in favor of Petitioner Powell in this case.

Cape v. Francis, 741 F.2d 1287 (11th Cir. 1984) supports Powell's claim that the Fifth Amendment privilege against self-incrimination, being "as broad as the mischief against which it seeks to guard," Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198, 35 L.Ed. 1110 (1892), should be, and is, tailored to different aspects of a capital murder trial and the use to which the State puts compelled and unwarned psychiatric evidence.

Cape claimed that his rights under the Fifth, Sixth and Fourteenth Amendments were violated by the admission of expert psychiatric testimony that he was sane and criminally responsible for his conduct at the time of the killing.

Before trial and with the agreement of defense counsel, the court ordered Cape's examination at the state psychiatric facility by Dr. Louis Jacobs.

Jacobs testified for the state at the guilt stage of the trial that as part of his thorough examination he had talked with Cape "at great length" about the details of how he came there" and "the details of the difficulty he was in." As a result of the interview Jacobs concluded that Cape was competent to stand trial and that he met "all of our criteria on evaluation for criminal responsibility" at the time of the murder.

On re-direct examination, Jacobs discussed the definition of "criminal responsibility": "[W]e always look to a person's ability to distinguish between right and wrong, and their ability to act on that knowledge. We also begin to look for any compulsive delusional materials which might affect their ability to distinguish between right and wrong in this patient."

The prosecutor argued to the jury that Jacobs "used the term, in his opinion, he was 'criminally responsible' for his actions, under his tests and evaluation. The man is responsible for what he did on May 17."

Cape claimed that this brought him within the Fifth and Fourteenth Amendment protections proclaimed in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

Cape recognized the distinction for Fifth Amendment purposes between a defendant's 'culpability or responsibility for the crimes charged against him' and his competency to stand trial, the first being afforded full Fifth Amendment protection and the second none. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981).

The Court ruled that "[r]egardless of what Cape actually

told Dr. Jacobs, however, the psychiatrist's testimony went beyond permissible bounds. . . [t]he psychiatrist did not state merely that Cape was competent to stand trial. He went further and made note of Cape's 'criminal responsibility at the time of the alleged occurrence.' The psychiatrist specifically referred to criminal responsibility twice after answering questions concerning Cape's mental competency and he defined the term 'criminal responsibility.'"

Dr. Jacobs' reference to Cape's criminal responsibility violated the petitioner's fifth and fourteenth amendment rights. The psychiatrist based his diagnosis on the substance of disclosures made during a custodial interrogation, thus making Cape's communications to him testimonial in nature. Smith, 451 U.S. at 465, 101 S.Ct. at 1874, 68 L.Ed.2d at 370."

Cape held that there is no waiver of the Fifth Amendment privilege when a defendant defends on an insanity claim. The psychiatric testimony must be limited to the sanity issue and this limitation is violated where the State's expert witness' testimony includes statements material to the issue of culpability, an issue on which the State has the burden of proof, using information obtained from his compelled examination of the defendant.

In Petitioner's case, the opinion testimony of Drs. Coons and Parker was critical to the State's burden of proving special issue number two (2) at the penalty stage of the trial -- that of future dangerousness. It was the only expert opinion testimony offered at that stage on one of the very issues before the jury. Given the actual use of the testimony, the psychiatric and psychological examinations were shown to be "a critical stage" of the aggregate proceedings against Powell with regard to his Sixth Amendment right to counsel.

The Court's general instruction that the jury could consider all of the evidence admitted at the first stage of the trial, was clearly insufficient to inform the jury that tes-

timony presented by the Petitioner on the issue of insanity could be considered for any other purpose at the penalty stage of the trial. This general instruction merely served to emphasize the aggravating factors introduced by the State to prove his guilt.

Conclusion and Prayer

For the reasons stated above this Petition for a Writ of Certiorari should be granted. The Court should then set aside the sentence of death imposed against David Lee Powell and remand this cause for further penalty proceedings, free from the constitutional violations which led to his sentence of death.

David Lee Powell prays for such relief.

Respectfully submitted

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Certification

I certify that I mailed a copy of this Petition for Writ of Certiorari to the Honorable Jim Mattox, Attorney General of Texas: Attention Enforcement Division, P.O Box 12548, Capitol Station, Austin, Texas 78711, by certified mail, on March 10, 1989.

Will Gray

Will Gray

DAVID LEE POWELL, Appellant

NO. 67,630 Appeal from TRAVIS County

THE STATE OF TEXAS, Appellee

OPINION ON REMAND FROM THE UNITED STATES SUPREME COURT

Appellant was convicted of capital murder. V.T.C.A., Penal Code Sec. 19.03(a)(1). Punishment was assessed at death. Art. 37.071(b), V.A.C.C.P. On direct appeal to this Court his conviction was affirmed. Powell v. State, 742 S.W.2d 353 (Tex.Cr.App. 1987). Appellant then filed a petition for writ of certiorari which was summarily granted by the United States Supreme Court. Upon consideration, the Supreme Court vacated our judgment and remanded for "further consideration in light of Satterwhite v. Texas," 486 U.S. ____, 108 S.Ct. 1792 (1988)(Satterwhite II). After renewed review, under the mandates of Satterwhite II, we will again affirm appellant's conviction.

An explanation of the precise procedural posture of this case is essential to our present disposition. On original submission to this Court, appellant alleged, inter alia, Estelle v. Smith error in the admission of psychiatric testimony at punishment. Estelle v. Smith, 451 U.S. 454 (1981) (Smith). Specifically, appellant contended that it was error to admit psychiatric testimony concerning future dangerousness where such testimony was based on pre-trial competency examinations conducted without the appropriate warnings or notice. We overruled this contention, and found no error stating, "[A]t first glance, this case seems to be ruled by the Supreme Court's decision in [Smith]. However, a thorough review of the record and a careful reading of both [Smith] and Battie [v. Estelle, 655 F.2d 692 (5th Cir. 1981)] brings us to the conclusion that

APPENDIX "A"

the instant case is distinguishable and is a case of first impression." Powell, supra, at 357-358. We opined that where the defendant raises the defense of insanity, which is applicable to guilt-innocence as well as punishment issues, he waives his Fifth and Sixth Amendment rights under Estelle v. Smith, supra concerning such psychiatric testimony.[1/] After finding no error, we gratuitously added the following harmless error argument:

> Finally, we conclude that even if there was error in admitting the [psychiatric] testimony... the error was harmless.
>
> . . . .
>
> We must conclude, as we did in Satterwhite v. State, 726 S.W.2d 81 (Tex.Cr.App. 1986) that: 'the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of the "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" even if [the psychiatric] testimony had not been admitted. The admission of the testimony was harmless error beyond a reasonable doubt.' [citation omitted].

Powell, supra at 359-360. Thus, our response to appellant's Smith allegation was two-fold: (1) there was no error and (2) even if error could be discerned, such was harmless under our then recent decision of Satterwhite v. State, 726 S.W.2d 81 (Tex.Cr.App. 1986) (Satterwhite I).

After being unsuccessful on direct appeal, appellant then filed a petition for writ of certiorari in the United States Supreme Court. In his petition appellant challenged, inter alia, both of our holdings on the Smith issue. In his first question for review, appellant challenged our core holding that a defendant waives his Fifth and Sixth Amendment Smith rights when he introduces psychiatric testimony in favor of an insanity contention. In his fifth question for review, appellant challenged our "f[a]ll back" holding that even if there was

1/ Since Powell, supra, this Court has reiterated this position. Barber v. State, ___S.W.2d___, No. 68,905 (Tex.Cr.App. Sept. 14, 1988)(Slip Op. at 11-13).

error, such was harmless under Satterwhite I. Appellant's petition was granted.

At that time, the harmless error analysis of Satterwhite I was pending review in the Supreme Court. See, Powell, supra at 370-371 (Teague, J., dissenting)(noting that the instant case should be held pending the outcome of Satterwhite I). Soon thereafter, the Supreme Court reversed Satterwhite I to hold that the Chapman v. California, 386 U.S. 18, 24 (1967), harmless error test applies to Smith error. Satterwhite II, supra at 486 U.S. ____, 108 S.Ct. 1797-98. The Court stated,

> Accordingly, we hold that the Chapman v. California, [supra,] harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in Estelle v. Smith.
>
> . . . .
>
> Applying the Chapman, supra, harmless error test, we cannot agree with the Court of Criminal Appeals that the erroneous admission of Dr. Grigson's testimony was harmless beyond a reasonable doubt. The question...is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'

After handing down Satterwhite II, the Supreme Court summarily vacated and remanded the instant case with a cursory order that it be further considered in light of Satterwhite II.[2/] Powell v. Texas, No. 87-6135, 56 U.S.L.W. 3893 (June 15, 1988). Thus, the Court's remand of the instant case under

2/ The Court took the same action with other cases in which review had been granted pending the outcome of Satterwhite II. Cook v. State, 87-7290, 44 Ca.L.Rep. 4013 (October 3, 1988); Lankford v. Idaho, 87-6276, 56 U.S.L.W. 3848 (June 13, 1988); Bennett v. Texas, No. 87-6410, 56 U.S.L.W. 3848 (June 13, 1988).

Satterwhite II subjects only our secondary reliance on the harmless error analysis of Satterwhite I to renewed review. See, Whan v. State, 485 S.W.2d 275, 277 (Tex.Cr.App. 1972) cert. denied, 411 U.S. 934 (1973)(reversal and remand as to specific point affects only that point). Cf., Schwerdtfeger v. State, 749 S.W.2d 781,783 (Tex.Cr.App. 1988)(Clinton, J., dissenting to refusal of appellant's petition for discretionary review) (reversal and remand on one ground does not limit lower court's authority to address grounds not previously addressed); Garrett v. State, 749 S.W.2d 784, 787 (Tex.Cr.App. 1986); Spindler v. State, 740 S.W.2d 789, 791 (Tex.Cr.App. 1987); Ware v. State, 736 S.W.2d 700, 701 ((Tex.Cr.App. 1987); Granviel v. State, 723 S.W.2d 141, 147 (Tex.Cr.App. 1986) cert. denied, ___U.S.___, 108 S.Ct. 205 (1987)(law of case doctrine).

Because we initially held that there was no error, the harmless error analysis of our original opinion was superfluous to the disposition and constituted nothing more than obiter dictum. However, in this dictum we utilized a harmless error standard which the Supreme Court has now denounced. Satterwhite II, supra. Thus, we withdraw that portion of our original opinion which gratuitously applied a harmless error analysis and we further disavow our prior reliance on the now overruled Satterwhite I. Our initial determination of no Smith error, as well as the remaining holdings of our original opinion, were not addressed by the Court; thus, they remain undisturbed. Consequently, appellant's conviction stands affirmed.

WHITE, Judge

(Delivered January 11, 1989)
En Banc
Publish

DAVID LEE POWELL, Appellant

No. 67,630 v. - - - Appeal from TRAVIS County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION ON REMAND FROM
THE SUPREME COURT OF THE UNITED STATES

This is a capital murder case in which judgment of the trial court assessed the death penalty. That judgment was affirmed by the judgment of this Court pursuant to its opinion in Powell v. State, 742 S.W.2d 353 (Tex.Cr.App. 1987).

In due course appellant filed his petition for writ of certiorari to review the judgment of this Court, and the Attorney General of the State of Texas responded with his brief in opposition. See Rules of the Supreme Court of the United States, Part V, Rules 17.1(c), 21.1(a),(h) and (j), and 22.1.[1/]

1/ Appellant presented for review the following germane (paraphrased) questions, viz:

> 1. Whether a defendant waives the Fifth and Sixth Amendment rights articulated in Estelle v. Smith and Miranda v. Arizona by introducing psychiatric testimony at the guilt stage of trial on the defensive issue of insanity at the time of the offense.

Petition, at 8.

> 2. Whether he was denied effective assistance of counsel, a fair and impartial trial, equal protection and due process of law and the right to be free from cruel and unusual punishment guaranteed by respective constitutional amendments because the trial court allowed expert witnesses of the State to give evidence obtained in violation of the Fifth, Sixth and Fourteenth Amendments, See Satterwhite v. Texas, No. 86-6284 (cert. granted June 1, 1987).

Petition, at 8. (That one is practically identical to the sole question presented in Satterwhite. See 41 CrL 4062, 4068).

> 5. Whether the Court of Criminal Appeals of Texas applied an unconstitutional standard in holding admission of testimony of those expert witnesses was harmless on the basis stated in its opinion in Powell v. State, 742 S.W.2d, at 360.

Petition, at 9.

Footnote 1 continued -

On May 31, 1988, the Supreme Court delivered its opinion in Satterwhite v. Texas, 486 U.S. ____, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). Given the single question presented, see ante at n.1, the Supreme Court first decided that "the use of Dr. Grigson's testimony at the capital sentencing proceeding on the issue of future dangerousness violated the Sixth Amendment," id., at ____, S.Ct., at 1797, L.Ed.2d, at 293; then it held that "the Chapman harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in Estelle v. Smith," id., at _____, S.Ct., at 1798, L.Ed. at 295; finally, it concluded, "Having reviewed the evidence in this case, we find it impossible to say beyond reasonable doubt that Dr. Grigson's expert testimony on the issue of Satterwhite's future dangerousness did not influence the sentencing jury," id., at ____, .S Ct., at 1799, L.Ed.2d, at

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Footnote 1 continued -

In opposition the Attorney General contended the Supreme Court "suggested" in Estelle v. Smith and "held" in Buchanan v. Kentucky that when defendant presents psychiatric testimony in support of an insanity defense the State may respond with competing testimony from its own expert witness, so that alert counsel "must be presumed to have consulted with Powell on the advisability of submitting to an examination," and would have anticipated that the State could rebut his expert testimony with its own psychiatric evidence. Brief, at 6-9.

As to waiving his Sixth Amendment right, the State conceded that "the record does not reflect an intelligent and understanding waiver of Powell's right to counsel," and instead conjured up that this Court had in mind a "waiver" more "in terms of estoppel or bar to objection due to the introduction of the evidence." Brief, n.3 at 9.

Finally, the State asserted, "The proper inquiry is not whether the evidence 'might' have affected the jury's verdict, but whether, absent the evidence, the jury would nonetheless have reached the same verdict. Chapman, 386 U.S. at 26." It said that was the test applied by this Court, and its conclusion was "justified by the facts in this case." Brief, at 13-14.

296.[2]

Considering the question presented to the Supreme Court and its decision, holding and conclusion in Satterwhite, see ante, at 2, to say, as the majority now does, that Satterwhite "solely concerned harmless error," slip opinion, at 3, is to disregard much in Part II of that opinion finding a violation of the Sixth Amendment right to assistance of counsel.

Thereafter, on June 30, 1988, in Cause No. 87-6135, David Lee Powell, Petitioner, v. Texas, the Supreme Court ordered a summary disposition of this cause under Rule 23.1.[3] First it granted leave to proceed in forma pauperis and granted his petition for writ of certiorari; then it entered a separate order stating in pertinent part, viz:

> THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,
>
> ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the Court of Criminal Appeals of Texas for further consideration in light of Satterwhite v. Texas, 486 U.S. ____ (1988).

See Powell v. Texas, ____ U.S. ____, 108 S.Ct. 2891, 101 L.Ed.2d 926, 43 CrL 4079 (1988).[4]

The majority characterizes as "cursory" the summary reconsideration order entered by the Supreme Court in this

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[2] All emphasis above and throughout is mine unless otherwise noted.

[3] "After consideration of the papers distributed pursuant to Rule 22, the Court may enter an appropriate order. The order may be a summary disposition on the merits."

[4] Above content of the summary reconsideration order is reproduced from a true copy attested by the Clerk of the Supreme Court.

cause. However, more than a superficial examination of the situation will dispel its belief that the remand order "subjects only our secondary reliance on the harmless error analysis of Satterwhite I to renewed review." Slip Opinion, at 3-4.

Formerly its practice of summary disposition on account of one or more recent intervening decisions produced a reversal or affirmance on the merits, but lately the Supreme Court "prefers to delegate the task to the lower courts." R.L. Stern, E. Gressman & S.M. Shapiro, Supreme Court Practice (6th Ed. 1986) 277-279. Once relatively rare, such summary reconsideration orders have become fairly common. See A. Hellman, Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review, 44 U.Pitt.L.Rev. 795, at 837, n. 239, discussed in R.L.Stern et al., supra, at 279, n. 73.[5/]

When the Supreme Court enters a summary reconsideration order "the lower court is being told to reconsider the entire case in light of the intervening precedent -- which may or may not compel a different result." R.L. Stern et al,, supra, at 280. In my view, there is more to reconsider than just "secondary reliance on the harmless error analysis of Satterwhite I," slip opinion, at 4.

In the first place, it is most unlikely that the Supreme Court would remand this cause for us to reconsider a superfluous

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5/ Close on the heels of Satterwhite, June 13, 1988, the Supreme Court vacated, respective judgments in two causes and remanded for reconsideration in light of Satterwhite, viz: Bennett v. Texas, No. 87-6410, reversing Bennett v. State, 742 S.W.2d 644 (Tex.Cr.App. 1987), and Lankford v. Idaho, No. 87-6276, reversing State v. Lankford, 113 Idaho 688, 747 P.2d 710 (Idaho 1997). See ___ U.S. ___, 108 S.Ct. 2185 (1988).

On October 3, 1988, in Cook v. Texas, No. 87-7290, the Supreme Court similarly remanded for reconsideration of Cook v. State, 741 S.W.2d 928 (Tex.Cr.App. 1987). ___ U.S. ___, 109 S.Ct. 39, 44 CrL 4013 (1988).

harmless error analysis, albeit it was utterly flawed. Unless the Supreme Court believed "there was error in admitting the testimony of Drs. Coon and Parker," Powell v. State, supra, at 359, there is nothing to test for harm.

Secondly, in Satterwhite v. Texas the Supreme Court restricted its review to a violation of defendants' "Sixth Amendment right to consult with counsel before submitting to psychiatric examinations to designed to determine their future dangerousness." 486 U.S., at _____, 108 S.Ct., at 1794, 100 L.Ed.2d, at 290; see ante at 2. That was the sole violation found by this Court in Satterwhite, 726 S.W.2d, at 92-94.

Similarly, in Bennett v. Texas, ante, n.4, at 5, the germane question presented for review is almost identical (even naming the same Dr. Grigson) to that in Satterwhite v. Texas, except that it also alludes to the Fifth Amendment; because this Court found error in admitting his testimony under state law, 742 S.W.2d, at 671, the Supreme Court necessarily determined that implications of the Sixth Amendment raised a substantial federal question, else it would not have granted the petition for writ of certiorari.

Likewise in Cook v. Texas, ibid., the question presented the issue of harmless error in admitting testimony of Dr. Grigson "in violation of petitioner's right to counsel under the Fifth and Sixth Amendments;" from the opinion of this Court that trial counsel specifically objected on "right to counsel" and preserved his Sixth Amendment error is manifest, 741 S.W.2d, at 944.[6/]

6/ The certiorari papers in Lankford v. Idaho, supra, are not readily available, so one cannot know what questions were presented to the Supreme Court that produced that "GVR" order. The opinion of the Idaho Supreme Court in State v. Lankford, ante, n. 4, at 5, considered and rejected many asserted errors, and its order on remand for rebriefing does not reveal grounds it will reconsider. See State v. Lankford, 761 P.2d 1169 (Idaho 1988).

In Powell v. State, supra, the majority opinion demonstrates that both the Fifth and Sixth Amendments were violated, viz:

> ". . . The record reflects that at no point in time did Coons or Parker inform appellant or his attorneys that they were asked to or had examined appellant on the issue of future dangerousness. Nor did Coons or Parker give appellant, who was in custody, Miranda warnings."

Id., at 357. Thus, but for the theory of waiver indulged by the majority, the trial court plainly committed error of constitutional dimension.

On that matter two points are immediately germane: First, in finding a "waiver" the majority relied primarily on dicta in Battie v. Estelle, 655 F.2d 692 (CA5 1981), which involves only the Fifth Amendment (indeed the Fifth Circuit expressly disclaimed any consideration of the Sixth Amendment right to counsel, id., n. 1, at 694); only tangentially did the majority include the Sixth Amendment error, Powell, supra, at 359. Second, before the Supreme Court the State gently declined to support that theory of "waiver," specifically advancing its own idea in the premises, viz:

> "The state recognizes that, while the court below stated that Powell 'waived' his Sixth Amendment right by introducing psychiatric testimony, the record does not reflect an intelligent and understanding waiver of Powell's right to counsel. See Barker v. Wingo, 407 U.S. 514 (1972). Rather, the 'waiver' of which the court speaks is in terms of estoppel or a bar to objection to the introduction of the evidence."

Brief, n.3, at 9. Patently, the Supreme Court was not persuaded that either the "waiver" theory applied by the majority of this Court or the alternative pursued by the State warranted summary affirmance of the judgment of this Court or a denial of certiorari. See Rule 23.1, supra.

Accordingly, its remand for reconsideration of "the entire case" was on account of the Sixth Amendment error confirmed and

found to be harmful in Satterwhite v. Texas. Contrary to the view of the majority, slip opinion, at 4, "the holdings of our original opinion do not "remain undisturbed."

Because the majority refuses to reconsider the Sixth Amendment violation, and thereby invites another petition for writ of certiorari, I respectfully dissent.

CLINTON, Judge

DELIVERED: January 11, 1989

EN BANC

PUBLISH

DAVID LEE POWELL, Appellant

NO. 67,630 vs. - - - APPEAL FROM TAVIS COUNTY

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

The Supreme Court of the United States has entered an Order that pertains to this cause, namely, "this cause is remanded to the Court of Criminal Appeals of Texas for further consideration in light of Satterwhite v. Texas, 486 U.S.___(1988)." What does this Order mean?

It appears to me and Joe Vargo of the Austin American-Statesmen, if no one else, that the Supreme Court's Order must be read literally, and, if read literally, it is obvious to me and Vargo, if no one else, that, as Vargo put it, the Supreme Court of the United States ruled that "In vacating Powell's [the appellant's] sentence, the Supreme Court said the trial court erred during the punishment phase of the trial by allowing testimony from a pyschiatrist [sic]."

I find that the Supreme Court of the United States disagrees not only with what this Court stated and held when this cause was previously before this Court regarding the Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), issue, i.e., it disagrees with what this Court's previous majority opinion stated and held regarding the admission of the opinion testimony of Drs. Coons and Parker on the issue of appellant's future dangerousness at the punishment stage of appellant's trial, but also disagrees with this Court's previous majority opinion's holding that any error in admitting such testimony was harmless under Chapman v. California, 386 U.S. 18, 87 S.Ct. 827, 17 L.Ed.2d 705 (1967).

When this cause was previously before this Court I agreed with what Presiding Judge Onion, now retired, stated in the dissenting opinion that he filed in this cause, but honestly believed that the Supreme Court of the United States, if given the opportunity, would adopt in principle what the majority opinion of this Court by Judge Mc Cormick, now Presiding Judge Mc Cormick, stated and held. Thus, I went out on the limb and made a prediction, which has now been proved wrong, and therefore must acknowledge that I should not ever predict in print what a majority of the present Supreme Court of the United States might state and hold in a given capital murder case.

My oath of office requires that when it comes to decisions of the Supreme Court of the United States, that concern federal constitutional law, I must acknowledge that that Court's decisions are the Supreme Law of the Land. See Article VI, Federal Constitution. Also see Massachusetts v. Upton, 466 U.S. 727, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984). Of course, if a state court judgment is based upon an independent and adequate state ground, the Supreme Court of the United States has no jurisdiction to decide the case so long as the state court's decision does not fall below the federal ceiling imposed on the States through the Fourteenth Amendment. See Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3468, 77 L.Ed.2d 1201 (1983). Also see Collins, Plain Statements: The Supreme Court's New Requirement, 70 A.B.A.J. 92 (1983).

Therefore, I respectfully dissent to the majority of this Court's refusal to adopt Presiding Judge Onion's well reasoned and well written dissenting opinion on original submission as "The Opinion of the Court of Criminal Appeals on Remand from the Supreme Court of the United States" and also respectfully dissent to this Court's majority opinion's feeble efforts to delay doing what its federal constitutional law duty requires that this Court must do.

TEAGUE, Judge

EN BANC

DELIVERED: January 11, 1989

PUBLISH

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DAVID LEE POWELL,
Petitioner

versus

THE STATE OF TEXAS,
Respondent

APPLICATION FOR WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Will Gray
Petitioner's lawyer
16420 Park Ten Place
Houston, Texas 77084
713/492-7718

APPENDIX "B"

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant waives the Fifth and Sixth Amendment rights articulated in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), if he introduces psychiatric testimony at the guilt stage of the trial, directed solely to the defensive issue of insanity at the time of the offense. Is the State then permitted, at the penalty stage of the trial, to present testimony from two experts, court-appointed to determine Petitioner's competency to stand trial and sanity at the time of the offense, who did not give him the Smith or Miranda warnings, and whose testimony bore directly on the issue of future dangerousness, one of the elements necessary for the State to prove beyond a reasonable doubt to support imposition of a death sentence.
2. Whether the petitioner was denied the effective assistance of counsel, a fair and impartial trial, equal protection, and due process of the law, and the right to be free from cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court allowed the State's expert witnesses to testify to evidence obtained in violation of the Fifth, Sixth and Fourteenth Amendments. See Satterwhite v. Texas, (cert. granted June 1, 1987) No. 86-6284.
3. Whether the petitioner was denied due process of law, and his right to be free from cruel and unusual punishment because the trial court refused to instruct the jury at the penalty stage of the trial to consider the issue of diminished responsibility based on the mitigating evidence introduced by the defense at the guilt phase of the trial. [See Franklin v. Lynaugh, (cert. granted) No. 87-5546.]

Question Three

Whether the petitioner was denied due process of law, and his right to be free from cruel and unusual punishment because the trial court refused to instruct the jury at the penalty stage of the trial to consider the issue of diminished responsibility based on the mitigating evidence introduced by the defense at the guilt phase of the trial. [See Franklin v. Lynaugh, (cert. granted) No. 87-5546.]

Question Four

Whether Article 37.071, Vernon's Ann. Code of Criminal Procedure is unconstitutional because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the penalty stage of the trial, and is heavily weighed in favor of the prosecution by focusing the jury's consideration on aggravating circumstances.

Question Five

Whether the Texas Court of Criminal Appeals applied an unconstitutional standard in holding that the admission of the testimony of the State's expert witnesses was harmless because "the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of the 'probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' even if (Dr. Coon's and Dr. Parker's) testimony had not been admitted. The admission of the testimony was harmless error beyond a reasonable doubt."

REASONS FOR GRANTING THE WRIT

I.

Powell relied on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), which at the time of the trial had been decided adversely to the State by the United States District Court[18] and on Battie v. Estelle, 655 F.2d 692 (5th Cir.1981), decided while his case was pending on appeal.

The Court of Criminal Appeals found the following factual similarities and differences between Powell's claim and those in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981).

The Court of Criminal Appeals interpreted Smith, as holding "that where prior to the in-custody psychiatric examination ordered by the court to determine the defendant's competency to stand trial the defendant had not been warned that he had the right to remain silent, and that any statement made could be used against him at the sentencing proceeding, admission at the penalty stage of a capital felony trial of a psychiatrist's damaging testimony on the crucial issue of future dangerousness violated the Fifth Amendment privilege against compelled self-incrimination because of a lack of appraisal of rights and a knowing waiver thereof," the death penalty imposed could not stand."

"The Court further held that the Sixth Amendment's right to counsel was violated where defense counsel was not notified in advance that the psychiatric examination would encompass the issue of future dangerousness and there was no affirmative waiver of the right to counsel."

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[18] Smith v. Estelle, 445 F.Supp. 647 (ND Tex. 1977).

A.

The Court of Criminal Appeals relied on the following illusive differences between the facts in Smith, and those in Powell's case:[14]

1. In Smith, the State trial judge, on his own motion, appointed psychiatrist Grigson to examine Smith and determine his competency to stand trial.
2. Shortly after Powell's apprehension on May 18, 1978, the prosecutor filed a motion requesting the trial court to order a psychiatric examination, claiming he had information which raised questions of Powell's (1) mental competency to stand trial and his (2) sanity at the time of the offense.
   a. The same day the trial court ordered Dr. Richard Coons, a psychiatrist, and a psychologist of his choice to examine Powell for the purpose of determining present competency and sanity at the time of the offense.
      Dr. Coons examined Powell on May 18th, 23rd and 29th and June 4, 1978.
   b. On May 18, 1978, Attorney Edith Roberts was appointed to represent Powell.
   c. Roberts had telephone conversations with Dr. Coons on May 23 and 24, 1978. She gave Coons permission to have Dr. Parker do some psychological testing of Powell. Nothing in the record shows that Parker's psychological testing would encompass the future dangerousness issue. In addition, Coons was already operating under a court order that permitted such testing by a psychologist of his choice.
3. Dr. Grigson examined Smith without giving any warnings regarding his Fifth Amendment privilege against self-incrimination and did not notify defense counsel that

[14] Undisputed facts in the record, as noted by the dissenting judges are indicated in this resume and noted therein.

the psychiatric examination would encompass the issue of Smith's future dangerousness, nor was the defendant accorded the assistance of counsel in determining whether to submit to such examination.

4. After the examination, Dr. Grigson reported to the court that Smith was competent to stand trial.
5. At his trial Smith raised no issue of either his competency to stand trial or his insanity at the time of the offense.
6. Grigson testified as a State's witness at the penalty stage of Smith's trial that, based upon his examination, he considered Smith a severe sociopath who would commit violent acts in the future "if given the opportunity to do so."
7. Powell was taken before a magistrate on the day of his arrest and warned of the accusation against him. Nothing in the record shows that the magistrate's warning included one relating to the psychiatric examinations.
8. Neither Coons nor Parker informed Powell or his attorneys that they had examined Powell on the issue of future dangerousness. Coons' initial examinations had taken place before his telephone conversations with defense counsel Roberts. Neither Coons nor Parker gave Powell, who was in custody, Miranda warnings.
9. Powell and his attorneys did not request a psychiatric examination on Powell's future dangerousness and they did not indicate they intended to offer psychiatric evidence at the penalty stage of the trial. [dissenting opinion].
10. On June 22, 1978 the Powell filed notice that he was presently incompetent to stand trial and that he would offer at trial "evidence of the insanity defense." [dissenting opinion].
11. Dr. Coons made two reports dated July 15, 1978, addressed to the district attorney, finding Powell to be competent and sane. [dissenting opinion].

12. The issue of present incompetency was abandoned by Powell on July 10, 1978. [dissenting opinion].

13. Powell did present the defense of insanity by the testimony of a Dr. Tenay, a psychiatrist. [dissenting opinion].

14. The State countered with the testimony of Drs. Coons and Parker that Powell was sane when the offense was committed. [dissenting opinion].

15. At the penalty stage of the trial the State offered the testimony of Drs. Coons and Parker, over objection, as to the issue of future dangerousness. Based on their examinations, interviews and testing, they expressed the opinion there was a probability that Powell in the future would commit criminal acts of violence that would constitute a continuing threat to society. [dissenting opinion].

16. The record does not reflect that either Dr. Coons or Dr. Parker gave Powell, who was in custody, Miranda warnings or informed him that the examinations were also for the purpose of determining his future dangerousness and whether he presented a continuing threat to society. And his attorneys were not so informed that the examinations and testings were for this additional purpose. [dissenting opinion].

17. Except for Dr. Coons' interview with on May 18, 1978, Powell, as in Smith, supra, was already under indictment when the examinations and testing took place. Thus his right to assistance of counsel had attached. Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). [dissenting opinion].

18. The opinion testimony of Drs. Coons and Parker offered by the State at the penalty stage of the trial was not made admissible because of any consent on the part of Powell to any examination for future dangerousness or because of the use by the Powell of psychiatric or psychological testimony at the penalty stage of the trial. [dissenting opinion].

19. The testimony of Drs. Coons and Parker cannot be classified as hypothetical opinion testimony of a psychiatrist or psychologist, who has not examined the defendant. Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), reh. den. 464 U.S. 874, 104 S.Ct. 209, 78 L.Ed.2d 185. [dissenting opinion].

B.

The Court of Criminal Appeals majority found the following superficial but critical differences between Petitioner's case and Smith.

1. "The distinguishing factor is that in Powell's case he argued the affirmative defense of insanity during the guilt-innocence phase of the trial through the testimony of [defense witness] Dr. Tenay."

2. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), "seems to suggest" that a defendant who introduces testimony on the issue of insanity at the guilt stage waives his Smith rights to prevent the State's use of similar psychiatric testimony at the penalty stage of the trial.

3. All members of the Court of Criminal Appeals agreed with the following Battie propositions:

   a. "A defendant's mere submission to a psychiatric or psychological examination does not constitute a waiver of his Fifth Amendment privilege."

   b. "The waiver doctrine does not apply if the defendant does not introduce the testimony of mental health expert on the issue of a mental state relevant to the offense or a defense raised by the evidence in the case."

   c. "There is a distinction between "the use of psychiatric examinations by the defense or the State to determine a defendant's competency to stand trial with the use of a psychiatric examination by the

defense or the State to ascertain the defendant's insanity at the time of the crime."

d. "Each use of psychiatric testimony raises questions different from those raised by the other and different doctrines have developed to account for these different problems."

e. "The State's use of the results of a competency examination does not infringe upon a defendant's fifth amendment privilege because it does not assist the State in proving any of the elements necessary to support the imposition of a criminal punishment under state law."

f. "When the same type of examination is used to determine a defendant's culpability or responsibility for the crimes charged against him the Fifth Amendment privilege is involved because the use of a psychiatric or psychological examination in this context may assist the State in establishing the basis for imposition of a criminal punishment. 655 F.2d at 700-701. (footnotes omitted)."

C.

The Court majority, narrowly and incorrectly construing both Smith and Battie, concluded that "once the defendant has argued the affirmative defense of insanity by use of testimony from a mental health expert, the Fifth Amendment privilege accompanying any psychiatric testimony has been waived."

The majority interpolated this limitation on the Smith rationale by finding that the Battie Court, in rejecting "the State's contention regarding waiver by virtue of requesting a competency hearing, the Fifth Circuit implicitly endorsed the concept of waiver by arguing the affirmative defense of insanity."

This implicit endorsement was supported by the fact that in a Texas capital murder trial, "since the information testified to by the mental health experts goes to assist the State in proving up one of the elements necessary to support the imposition of capital punishment under state law--specifically, the issue of future dangerousness--under Battie, [Powell], in presenting such an insanity defense has waived his Fifth Amendment privilege."

This last statement implies that the applicable Texas statutes eliminate all Fifth Amendment considerations at the penalty phase of the trial where the parties have presented evidence at the guilt phase of the trial on an entirely different issue on which defendant has the burden of proof.

Under the court's murky reasoning "a defendant can invoke the protection of the privilege [only] when he does not introduce mental health expert testimony."

The Court's majority found further affirmation for Powell's "waiver" of his Fifth Amendment privilege "by several of his actions at the punishment phase of the trial." These actions were:

1. Powell requested a jury instructions on the issue of "diminished responsibility" in mitigation of punishment, based on the psychiatric testimony adduced by him a the guilt stage of the trial in support of his affirmative defense of insanity at the time of the offense.[1]

This ignores the fact that these requested mitigating instructions were rejected by the trial judge and that rejection was affirmed by the Court on appeal, and the further fact, discussed below, that the Texas capital murder scheme as presently enforced, has no provision for a jury instruction on mitigating evidence. See Penry v. Lynaugh, 832 F.2d 918 (5th Cir. November 25, 1987).

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[1] These requested instructions are detailed below, under Petitioner's third question.

A second factor supporting the "waiver" of Powell's Fifth and Sixth Amendment rights occurred, according to the Court majority, during closing argument at the punishment phase of the trial, when Powell's attorney made the following argument:

> "'But when we talk about psychiatric testimony, I just really wonder if you missed the whole thing. Dr. Coons (the State expert), four years experience; Dr. Tenay (the defense expert), twenty years experience; Dr. Coons, no medical history on the patient; Dr. Tenay, complete medical history; Dr. Coons, no forensic medicine in homicide (sic); maybe had heard a lecture and been around a little but no courses as such; Dr. Tenay, the leading authority in the United States on forensic medicine on homocide (sic).' (material in brackets added)."

The majority concluded from this argument that:

> "[c]learly, the defense wished the jury to consider the psychiatric testimony introduced by [Powell] at the guilt-innocence phase of the trial and compare it with the psychiatric and psychological testimony elicited from the State's experts at both the guilt-innocence phase of the trial and the punishment phase of the trial.

This argument touched in no way any aspect of Tenay's guilt stage testimony relating to insanity that had a bearing on the future dangerousness issue. It was made after the jury had rejected Tenay's testimony on the insanity issue at the guilt stage of the trial and after the trial court had admitted and the jury had heard the inadmissible testimony of Coons and Parker on the issue of future dangerousness and the trial court had refused to instruct the jury on the issue of diminished responsibility.

The major authority cited by the Court in support of its unsound premise was Penry v. State, 691 S.W.2d 636 (Tex.Cr.App. 1985), a case in which the United States Court of Appeals, on habeas corpus appeal, carefully analyzed the Texas capital murder scheme under the evolving capital murder case law. Judge Reavley concisely high-lighted the probable fundamental constitutional defects in the penalty procedures. See Penry v. Lynaugh, 832 F.2d 915 (5th Cir. November 25, 1987). This case is discussed in the final part of Powell's petition.

The Powell majority found the following illusory similarities with Penry:

> 1. Penry raised the issue of insanity at the guilt phase and reintroduced all of that testimony at the punishment stage, making it clear from the his jury argument that he wanted the jury to reconsider all of the testimony relevant to the insanity defense at the punishment stage, and wanted the jury to consider it as to "each of those special issues." It was clear [to the Court] that Penry's jury arguments and reintroduction of the guilt phase testimony were not a response to the testimony of the State's experts. Rather, throughout the entire trial, Penry relied heavily on his history of mental instability.

There is nothing in the Powell record to show that it was he who introduced the guilt-stage evidence at the penalty stage of the trial.

Even had he done so, however, this reintroduction could not, under the Texas capital murder scheme, have aided the jury in considering his claim of diminished responsibility and impaired mental condition in mitigation of punishment. In addition, defense counsel did not even argue these mitigating defenses after the trial court rejected his requested jury instructions. Their desultory argument in comparing in Tenay's qualifications with those of Coons and Parker, were not directed to their rejected mitigating factors.

In Powell's case, the opinion testimony of Drs. Coons and Parker "was the only opinion testimony on the future dangerousness, and it was tainted by Sixth Amendment error. Unlike Satterwhite, there was no untainted opinion evidence on the same issue."

Presiding Judge Onion applied the following standards to his determination that there was no federal harmless error under the Powell facts:

1. The test for "harmless federal constitutional error is not whether a conviction could have been had without the improperly admitted evidence but 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Chapman v. California, 386 U.S. 18, 87 S.Ct. 827, 17 L.Ed.2d 705 (1967)."
2. "The question cannot be answered by merely considering the error in isolation. Harryman v. Estelle, 616 F.2d 870, 876 (5th Cir.) (en banc), cert. den. 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980). The facts and circumstances of each individual case must be considered. Bird v. State, 692 S.W.2d 65 (Tex.Cr.App.1985)."

Under these standards, the dissenters, "considering the State's penalty evidence along with the evidence adduced by both sides at the guilt phase of the trial, including the testimony of Powell's own psychiatrist on the issue of insanity as a defense, could not say that the improperly admitted evidence was harmless error beyond a reasonable doubt and did not contribute to the affirmative answer to the special issue on Powell's probable future dangerousness."

"The main consideration in determining this question was the probable impact on the minds of the average juror. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Gaulgin v. State, 683 S.W.2d 411, 415 (Tex.Cr.App.1984). The issue of future dangerousness was one of the critical issues before the jury at the penalty

stage, and the tainted evidence was the only medical and opinion testimony offered on that issue upon which the State had the burden of proof."

Judges Onion and Clinton concluded "that there was a reasonable possibility that the testimony contributed to the jury's verdict. [They could not] say that the evidence admitted on violation of Powell's federal constitutional rights constituted harmless error beyond a reasonable doubt. See White v. Estelle, supra; Holloway v. Arkansas, 435 U.S. 475, 489- 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978)."

These conclusions are fully supported by those Smith decisions where the Courts have found the error to be harmless beyond a reasonable doubt. See, Cf., United States ex rel. Bachman v. Hardy, 637 F.Supp. 1273 (DC Ill, N.D. 1986).

In Witt v. Wainwright, 714 F.2d 1069 (11th Cir.1983), reversed on other grounds, Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), under circumstances almost identical with those in Smith, the Court held that the unwarned psychiatric testimony admitted at the penalty phase of the trial was not probative as to any of the statutory aggravating circumstances the sentencer was entitled to consider and its admission thus was harmless error. The testimony in Smith, and in Powell, however, went directly to the major penalty issue on which the State had the burden of proof, that of future dangerousness.

In Cape v. Francis, 741 F.2d 1287 (11th Cir.1984), cert. denied, --- U.S. ----, 106 S.Ct. 281, 88 L.Ed.2d 245 (1985), detailed above, the Court found that the admission of Dr. Jacob's testimony was harmless error because (1) it did not truly address any issue essential to the jury's consideration -- it was merely a comment on Cape's sanity at the time of the murder. By proving Cape's sanity, the State only proved a fact not necessary to its burden of proof. The evidence was not 'critical' to an issue in the case." 741 F.2d at 1297.

G.

Another factor militating against a "harmless error" ruling in Powell's case, is the Court's fundamentally unfair use of defense counsel's request at the penalty stage of the trial for jury instructions on the mitigating factors of "diminished responsibility" and "impaired mental condition" as evidence that he waived his Fifth and Sixth Amendment rights under Smith merely by asking for a jury charge.

The following requested instructions were submitted to the trial court and were summarily denied; this ruling was approved on appeal:

1. "You are further instructed that you may consider any evidence you have heard during both phases of this case as the same may mitigate or impair David Lee Powell's ability to conform his acts to the law even though such mitigating facts may not be insanity as herein before defined to you."
2. "You are further instructed that in answering the questions required of you in this charge, you may consider all of the evidence which you heard in the initial phase of this case relating to the Defendant's insanity; and whether or not the same proofs (sic) by a preponderance of the evidence, diminished capacity."
3. "Do you find from a preponderance of the evidence that the intent or knowledge as those terms have heretofore been defined by the Court for you of David Lee Powell on May 18, 1978, was diminished by toxic psychosis, methane amphetamine-induced (sic)? Answer yes or no."

The Court of Criminal Appeals cavalierly dismissed Powell's appellate complaint that Article 37.071, V.A.C.C.P., is unconstitutional because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the penalty stage of the trial, and

is heavily weighed in favor of the prosecution by focusing the jury's consideration on aggravating circumstances.

The Court merely noted that "this contention has been addressed and overruled by this Court on several other occasions. Anderson v. State, 701 S.W.2d 868 (Tex.Cr.App. 1985); Penry v. State, 691 S.W.2d 636 (Tex.Cr.App.1985); Stewart v. State, 686 S.W.2d 118 (Tex.Cr.App.1984). Petitioner's brief contains nothing to persuade us that our prior rulings in this area have been wrong."

These rulings by the Court are not carved in stone. They ignore the serious misgivings now being expressed by some Judges of the intermediate Federal Courts. The most recent and influential statement from the Fifth Circuit came in Penry v. Lynaugh, 832 F.2d 915 (5th Cir. November 25, 1987), Penry v. State, 691 S.W.2d 636 (Tex.Cr.App.1985), one of the cases cited in Powell as authority for both rejecting Powell's requested instructions and his argument going to the unconstitutionality of Article 37.071, because it provides no vehicle by which a jury can apply possible mitigating evidence to the specific special issues submitted to Texas capital murder jurys.

Both members of the Penry panel, Judge Reavley and Judge Garwood [the third member, Judge Hill, was deceased], carefully reviewed the claim that "Texas law did not permit the jury to consider, and to apply, all of Penry's personal mitigating circumstances prior to reaching the verdict that mandated his death sentence."

Both Judges conceded that they were "bound by superior authority to reject that contention, . . . [they] discuss[ed] the problem fully to demonstrate why it may merit further consideration."

After Penry was found guilty of capital murder, his counsel objected at the penalty stage of the trial to the court's failure to instruct the jury to weigh aggravating and mitigating circumstances and to authorize a discre-

tionary grant of mercy based on the existence of mitigating circumstances.

The objections were overruled and the jury answered "yes" to all three special issues. Penry was sentenced to death.

The troubled Court recognized the rub of unconstitutionality inherent in the Texas capital punishment scheme.

1. "The jury was allowed to hear all evidence that might mitigate the culpability of Penry's deeds or his person. The jury could then consider (i.e. think about) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether Johnny Paul Penry should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict?

2. "No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that Penry will be a continuing threat, the jury can say no more. The court, following Texas law, ends the matter and orders death.

3. "It is difficult to see how this procedure accords with some of the Supreme Court's writings on the Eighth Amendment's mandate of individualized application of all mitigation along with aggravation in the sentencing decision. In order to explain our concern, we must look further at the Supreme Court's writings on capital punishment."

After a conscientious review of this Court's decisions beginning with Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), Judge Reavley had "no doubt that the Texas statute sufficiently narrows the circumstances in which death is imposed. Instead, [he was] concerned with Gregg's second part; the individual consideration of the circumstances of the crime and the character of

the individual. That law has not been stagnant since Gregg. The Supreme Court has developed what is meant by individualized consideration.

A detailed review of the evolving case law bearing on the concept of "individualized consideration" through Hitchcock v. Dugger, --- U.S. ----, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) left Judge Reavely less convinced.

The mere presentation of mitigating factors to the sentencing authority is not enough. Not only is the defendant permitted to present any relevant mitigating evidence "but 'Lockett requires the sentencer to listen' to that evidence." Sumner v. Shuman, --- U.S. ----, ----, 107 S.Ct. 2716, 2722, 97 L.Ed.2d 56 (1987) (quoting Eddings, 455 U.S. at 115, n. 10, 102 S.Ct. at 877, n. 10)."

Judge Reavley interpreted this to mean that "the sentencer not be precluded from listening to and acting upon any mitigating circumstance. That is not to say that the aggravating and mitigating circumstances must be balanced in any particular way. See Zant v. Stephens, 462 U.S. 862, 873-80, 103 S.Ct. 2733, 2741-44, 77 L.Ed.2d 235 (1983). It is simply to say that the jury may not be precluded from allowing the evidence of mitigation to enter into their decision."

Judge Reavely then reached the crux of the issue, the fatal flaw that deflects a Texas jury from considering the mitig ing factors to focus its attention on the aggravating circumstances.

1. The issue, then, is whether the questions, within their common meaning, permit the jury to act on all of the mitigating evidence in any manner they choose. In other words, is the jury precluded from the individual sentencing consideration that the Constitution mandates? The jury may only find whether the murder was deliberate with a reasonable expectation of death and whether there is a probability that the defendant will in the future

commit criminal acts of violence that constitute a threat to society.

2. Although most mitigating evidence might be relevant in answering these questions, some arguably mitigating evidence would not necessarily be. The jury, then, would be effectively precluded from acting on the latter. Actually, these questions are directed at additional aggravating circumstances. Once found beyond a reasonable doubt, the death penalty is then mandatory. The jury cannot say, based on mitigating circumstances, that a sentence less than death is appropriate. How can a jury act on its "discretion to consider relevant evidence that might cause it to decline to impose the death penalty"? [citation omitted]. Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"? [citation omitted].

Judge Reavley perceptively noted that "[d]eveloping Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require. Perhaps, it is time to reconsider Jurek in light of that developing law."

The futility of fitting Penry's appalling mitigating factors into the straightjacket imposed on the jury by Article 37.071, was thus summarized:

1. "Penry introduced evidence of his mental retardation and his inability to read or write. He had never finished the first grade. His emotional development was that of a child. He had been beaten as a child, locked in his room without access to a toilet for considerable lengths of time. He had been in and out of a number of state

schools. One effect of his retardation was his inability to learn from his mistakes.

2. "The evidence is similar to that in Hitchcock and Eddings. Those cases arguably teach us that it must be considered by the sentencer. Yet the Penry jury was allowed only to answer two questions. First, was the killing deliberate with reasonable expectation of death. Having just found Penry guilty of an intentional killing, and rejecting his insanity defense, the answer to that issue was likely to be yes. Although some of Penry's mitigating evidence of mental retardation might come into play in considering deliberateness, a major thrust of the evidence on his background and child abuse, logically, does not.

3. "The second question then asked whether Penry would be a continuing threat to society. The mitigating evidence shows that Penry could not learn from his mistakes. That suggests an affirmative answer to the second question.

4. "What was the jury to do if it decided that Penry, because of retardation, arrested emotional development and a troubled youth, should not be executed? If anything, the evidence made it more likely, not less likely, that the jury would answer the second question yes. It did not allow the jury to consider a major thrust of Penry's evidence as mitigating evidence. We do not see how the evidence of Penry's arrested emotional development and troubled youth could, under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances."

Even though defense counsel effectively argues the mitigating evidence admitted at the trial, the "question is

whether the jury could act on [those] circumstances and not impose the death penalty."

Just as in Penry, the jury in Powell's case was not instructed that possible mitigating evidence should or could be considered by it at the penalty stage of the trial.

The Court's general instruction that the jury could consider all of the evidence admitted at the first stage of the trial, was clearly insufficient to inform the jury that testimony presented by Powell on the issue of insanity could be considered for any other purpose at the penalty stage of the trial. This general instruction merely served to emphasize the aggravating factors introduced by the State to prove his guilt.

The prejudice to Powell was magnified when the State presented the testimony of Coons and Parker that he would be a future danger to society, given the additional fact, apparent to the jury, that Powell's own psychiatric witness, Tenay, did not testify at the penalty stage of the trial, leaving a strong inference or presumption that he agreed with the Coons-Parker evaluation.

Finally, even if the jury had been instructed to consider the mitigating factors, the haunting questions posed by Judge Reavley remain: How can a jury act on its "discretion to consider relevant evidence that might cause it to decline to impose the death penalty"? Where, in the Texas scheme is the "moral inquiry" of the "individualized assessment of the appropriateness of the death penalty"?

There is no way the mitigating circumstances proffered by Powell could, "under the instructions and the special issues, be fully acted upon by the jury. There is no place for the jury to say "no" to the death penalty based on a principal mitigating force of those circumstances."

One aspect of this problem is now pending before the Court on certiorari in Franklin v. Lynaugh, (cert. granted) No. 87-5546.

Conclusion and Prayer

For the reasons stated above, and predicated on evolving Eighth Amendment standards, this Petition for a Writ of Certiorari should be granted. The Court should then set aside the sentence of death imposed against David Lee Powell and remand this cause for further penalty proceedings, free from the constitutional violations which led to his sentence of death.

David Lee Powell prays for such relief.

Respectfully submitted

Will Gray
Appellant's lawyer
TBA No. 08339000
16420 Park Ten Place
Houston, Texas 77084
713/492-7718

Certification

I certify that I mailed a copy of this Petition for Writ of Certiorari to the Honorable Jim Mattox, Attorney General of Texas: Attention Enforcement Division, P.O Box 12548, Capitol Station, Austin, Texas 78711, by certified mail, on December 28, 1987.

Will Gray

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 30, 1988

Mr. Will Gray
16420 Park Ten Place
Houston, TX 77084

Re: David Lee Powell,
v. Texas
No. 87-6135

Dear Mr. Gray:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of Satterwhite v. Texas, 486 U.S. ------ (1988).

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

Joseph F. Spaniol, Jr.

— APPENDIX "C" —

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

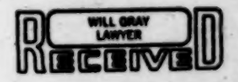
DAVID LEE POWELL — CAUSE NUMBER 67,630

VS.

STATE OF TEXAS

On this 18th day of January, 1989, came on to be considered the Appellant's Motion to Stay or Recall the Mandate.

AND SUCH MOTION is hereby granted, the mandate is stayed until the 13th day of March, 1989.



IT IS SO ORDERED.

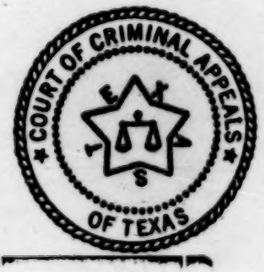
JAN 21 1989

PER CURIAM

A TRUE COPY ATTEST:

Thomas Lowe, Clerk
Court of Criminal Appeals

By: Lynne Hudson
Deputy Clerk



— APPENDIX "D" —

4. Whether Article 37.071, Vernon's Ann. Code of Criminal Procedure is unconstitutional because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the penalty stage of the trial, and is heavily weighed in favor of the prosecution by focusing the jury's consideration on aggravating circumstances.

5. Whether the Texas Court of Criminal Appeals applied an unconstitutional standard in holding that the admission of the testimony of the State's expert witnesses was harmless because "the properly admitted evidence was such that the minds of an average jury would have found the State's case sufficient on the issue of the 'probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' even if (Dr. Coon's and Dr. Parker's) testimony had not been admitted. The admission of the testimony was harmless error beyond a reasonable doubt."

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OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is not yet reported; a copy of the slip opinion is attached as Appendix A.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is based on the following:

1. Petitioner's conviction and sentence of death were affirmed by the Court of Criminal Appeals of Texas on July 8, 1987, P.J. Onion dissenting in an opinion joined by Clinton, J, with a dissenting and concurring opinion by Teague, J. Petitioner's motion for leave to file a motion for rehearing, and motion for rehearing, submitted on August 7, 1987, were denied by the Court without written opinion, on October 28, 1987.

   On November 3, 1987, the Court of Criminal Appeals of Texas granted petitioner's motion to stay or recall the mandate until the 28th day of December, 1987.

2. Rule 17.1 (c), Rules of the Supreme Court: The State Court "has decided an important question of federal law which has not been, but should be, settled by this Court, [and] has decided a federal question in a way in conflict with applicable decisions of this Court."

3. 28 U.S.C. Section 1257(3): "[W]here the validity . . . of a State statutes drawn in question on the grounds of its being repugnant to the Constitution of the United States . . . [and] where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . [of] the United States."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment to the Constitution of the United States: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

2. Sixth Amendment to the Constitution of the United States: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

3. Eighth Amendment to the Constitution of the United States: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

4. Fourteenth Amendment to the Constitution of the United States: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. Article 37.071, Texas Code of Criminal Procedure:

"(b) On conclusion of the presentation of the evidence, [at the penalty stage of the trial] the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3). if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted."

6. Section 19.03, Texas Penal Code:

"(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

(1) the person murders a peace officer of fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman."

STATEMENT OF THE CASE

Shortly after midnight on May 18, 1978, Austin police officer Ralph Ablanedo called police dispatcher Bittick, and asked her to determine if Sheila Margaret Meinert was wanted for any offense and if a vehicle bearing a specific vehicle identification number was stolen.

Bittick advised Ablanedo that Meinert was not wanted. The computer inquiry on the vehicle was pending.

Five minutes later, Ablanedo requested a check on David Lee Powell. That check showed that Powell was a "possible wanted" for misdemeanor theft. Officer Bruce Mills was dispatched to the scene to assist Ablanedo.[1]

Shortly thereafter, Bittick heard something like a scream over the radio, and then the voice of Mills calling for more patrol units and an ambulance. He reported that there was an officer "down," and that a red Mustang was involved and that the occupants were armed.[2]

Other witnesses described seeing a red Mustang automobile stopped in that block, with a police car behind it. The police car had its flashing lights on. A police officer and a female were seen standing between the two cars. Then there was the sound of gunshots, and the Mustang drove rapidly away.[3]

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[1] R. VI, 1383, 1391, 1422, 1424, 1426-1433.

[2] R. VI, 1435-1438.

[3] R. VI, 1503-1510; 1512-1513; R. VII, 1532-1542.

Petitioner was identified as the man sitting in the back seat of the Mustang as the shots were fired, with another person sitting in the driver's seat. The Mustang stopped further up the street, and Petitioner moved to the front passenger side.[4]

Officer Joe Villegas heard the radio description of the red Mustang, and concluded that an apartment complex nearby would be a likely hiding place. Checking the parking lot of the complex with his spotlight, Villegas saw a red Mustang with two occupants. As he pulled into the parking lot, he was met with a hail of automatic weapon fire coming from the right rear of the Mustang. He stopped, jumped out of his car, and returned the fire. Shortly thereafter, he saw a man running in a crouched position from the Mustang, south toward Travis High School. The man turned back and looked at Villegas from a distance of 15 or 20 yards, and Villegas later identified the man as Petitioner. Petitioner disappeared around the corner of the high school.[5]

Sergeant Darrell Gambrell joined Villegas during the firing at the apartment complex and saw a person get out of the Mustang and lie down next to it as the other person was running toward the high school. Gambrell and Officer Tommy Foree reached the person lying down, handcuffed her and searched her for weapons. The person was Sheila Meinert, Petitioner's companion.[6] Inside the Mustang the officers found an AK-47 automatic rifle, which was still hot to the touch from recently having been fired. It was later shown that Ablanedo had been shot with a Chinese version of a Russian AK-47 automatic rifle.[7]

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[4] R. VII, 1595; 1659-1661.

[5] R. VII, 1812-1813; 1818-1821; 1823-1828; R. VIII, 1855-1862.

[6] R. VIII, 1878-1886.

[7] R. VIII, 1936-1943; R. IX, 2315.

Officer Bruce Boardman came into the apartment complex as the firing was going on. He saw a person with long hair come up and make a throwing motion toward Officer Villegas and those with him. An unexploded hand grenade was later found about ten feet from Villegas' patrol car. The safety pin had been removed. An officer found a pin similar to the type used in such grenades lying on the ground approximately three feet from the passenger door of the Mustang. At dawn Petitioner was found under a bush at Travis High School by a school patrolman. He offered no resistance.[8]

After the State rested, Petitioner raised the defense of insanity at the time of the offense. His evidence on this issue came chiefly from Dr. Emanuel Tenay, a psychiatrist.

Dr. Tenay testified that he had conducted lengthy interviews with Petitioner, members of his family, and his friends and acquaintances, and had reviewed a sizeable amount of Petitioner's personal writings.

In Tenay's opinion, Petitioner had been insane on May 18, 1978, at the time officer Ablanedo was shot and killed. He believed that on that occasion Petitioner was suffering from paranoid schizophrenia, a form of psychosis. Dr. Tenay believed that this condition was largely the result of prolonged use of psychoactive drugs such as amphetamine and methamphetamine. There was other evidence that Petitioner had been heavily involved in the sale and perhaps manufacture of amphetamines, or "speed."[9]

The State refuted this defensive theory through the testimony of Dr. Richard Coons, a psychiatrist, and Dr. George Parker, a psychologist.

Dr. Coons met with and examined Petitioner on four occasions: on May 18, 1978, some 12 hours after the shooting, and again on May 23, May 29 and June 4, 1978.

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[8] R. VIII, 1908-1910; R. VIII, 1866-1869.

[9] R. X, 2587-2672.

The first meeting occurred pursuant to an order signed by the trial court on the morning of the shooting. This order provided that Petitioner undergo examination and testing by Dr. Coons and a practicing psychologist of his choice to determine Petitioner's competency to stand trial and his sanity at the time of the offense. This order was made upon the motion of the State.

Dr. Coons testified that based on his several examinations of Petitioner, there was no indication that Petitioner had been insane on May 18, 1978. He specifically disclaimed having observed any evidence that Petitioner was suffering from paranoid schizophrenia.[10]

Dr. George Parker, a clinical psychologist practicing in Austin, testified that he had met with Petitioner on June 25 and July 2, 1978, at the Travis County jail. Each meeting lasted two to two and a half hours. He administered several standardized psychological tests to Petitioner, to determine intelligence, to detect the presence of any organic neurological disorders, and to examine personality functions. He was able to detect no organic difficulties. He found Petitioner to be very intelligent and articulate, with an IQ of 128. He characterized Petitioner's personality as impulsive, high-energy, rebellious, non-conforming, immature and somewhat egocentric. In his opinion that Petitioner had been sane under Texas law on May 18, 1978, and that the testing showed no indication of paranoid schizophrenia.[11]

At the penalty stage of the trial the State put on evidence that in January 1978, after having been evicted from an apartment for nonpayment of rent and having had the personal property therein impounded in December of 1977 by the landlord, George Sandlin, Petitioner had broken into Sandlin's storage facility to remove his belongings. Lee Ramos, a maintenance employee who was driving a Sandlin

[10] R. X,2725-2738.

[11] R. X, 2709-2719.

truck, happened upon this apparent burglary and stopped his truck. Petitioner advanced upon him with a knife, and when Ramos fled in his truck, Petitioner chased him all the way home and then tried to get him to come outside. Ramos declined.[12]

Also admitted as punishment evidence was testimony that a search of Petitioner's house the day after the shooting revealed a hand grenade, two cannisters of ether, a box of .45 caliber ammunition, a box of 7.62 mm Russian ammunition, and a set of die used in processing ammunition for an AK-47 Russian automatic rifle. Also found in the kitchen were various beakers, chemicals and paraphernalia. A photograph of these items as they appeared in the kitchen was admitted into evidence. The police conducting the search also seized three small vials containing methamphetamine, with a total weight of approximately one gram.[13]

Drs. Coon and Parker were called by the State and permitted, over objection, to testify on the issue of future dangerousness based on their examinations, interviews and testings of Petitioner. Both testified that in their opinion there was a "high" probability Petitioner would commit future acts of violence that would constitute a continuing threat to society.[14]

Petitioner called the Travis County district attorney, who testified that Petitioner through his counsel had volunteered the information that there was a hand grenade in his house. Edith Roberts, one of Petitioner's counsel, also testified to the voluntary surrender of the grenade.

Because of their interlocking nature, all of the questions presented for review are discussed together.

[12] R. XI, 2909-2933.

[13] R. XI, 2935-2954.

[14] R. XI, 2978-2979; 3000.

Question One

Whether a defendant waives the Fifth and Sixth Amendment rights articulated in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), if he introduces psychiatric testimony at the guilt stage of the trial, directed solely to the defensive issue of insanity at the time of the offense. Is the State then permitted, at the penalty stage of the trial, to present testimony from two experts, court-appointed to determine Petitioner's competency to stand trial and sanity at the time of the offense, who did not give him the Smith or Miranda warnings, and whose testimony bore directly on the issue of future dangerousness, one of the elements necessary for the State to prove beyond a reasonable doubt to support imposition of a death sentence.

Question Two

Whether the petitioner was denied the effective assistance of counsel, a fair and impartial trial, equal protection, and due process of the law, and the right to be free from cruel and unusual punishment guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court allowed the State's expert witnesses to testify to evidence obtained in violation of the Fifth, Sixth and Fourteenth Amendments. See Satterwhite v. Texas, (cert. granted June 1, 1987) No. 86-6284.